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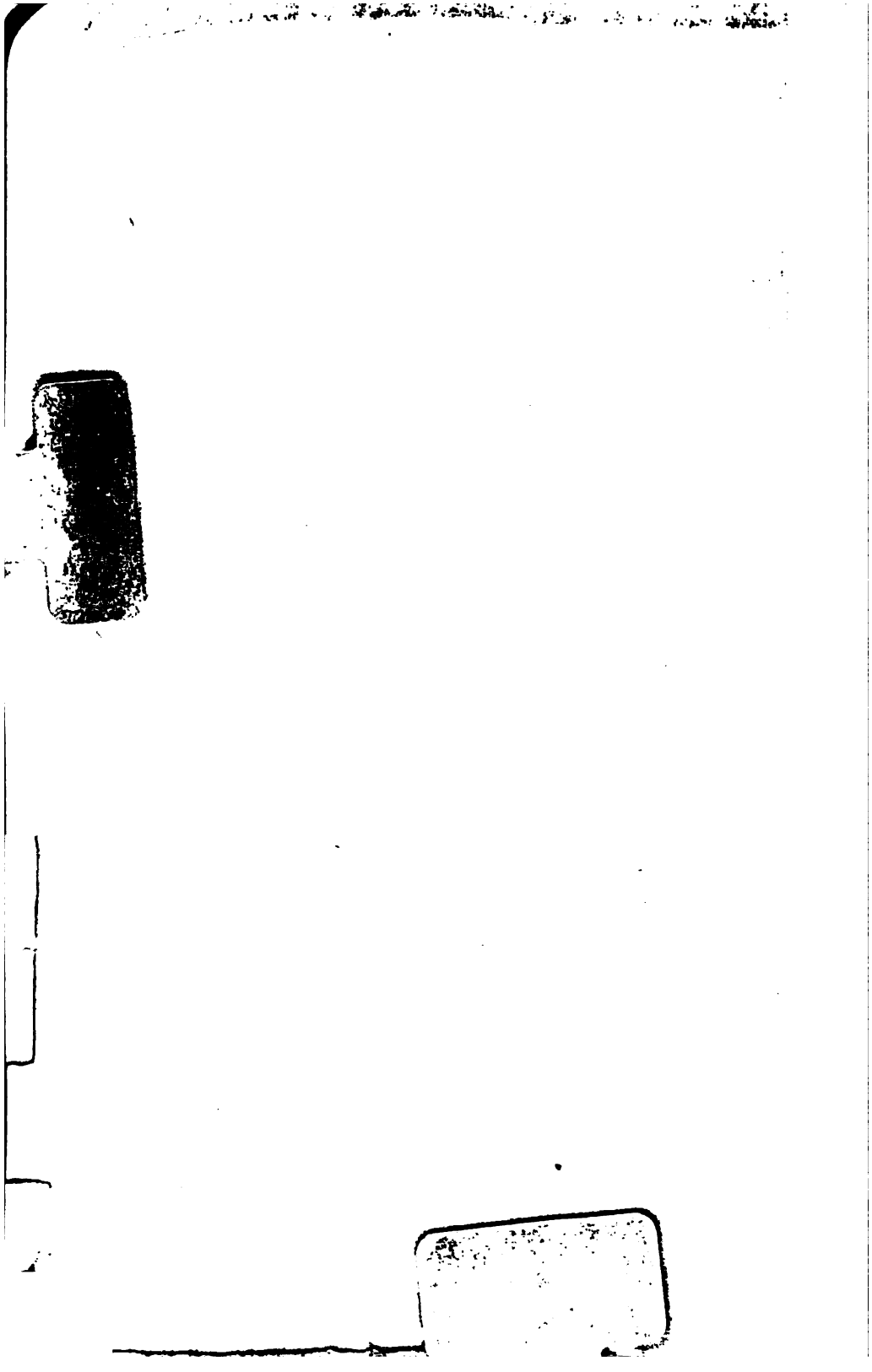

Modern American Law

A Systematic and Comprehensive Commentary on the Fundamental Principles of American Law and Procedure, Accompanied by Leading Illustrative Cases and Legal Forms, with a Revised Edition of Blackstone's Commentaries

PREPARED BY

JUDGES, MEMBERS OF THE BAR, TEACHERS IN LAW SCHOOLS, AND WRITERS ON LEGAL SUBJECTS

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LAW OF TORTS

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VOLUME II

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Part VI, "Malicious Prosecution," has been written by Dean John C. Townes, University of Texas. "Interference with Domestic, Contractual and Business Relations," constituting Part VII, is a comparatively new branch of the law. Professor William C. Jones is the author of this treatise and also wrote the commentary following, "Right of Privacy." Part IX is by Professor George F. Wells, University of West Virginia. He discusses the principles underlying the questions arising in "Extra-Hazardous Occupations," as, for example, those concerning explosives, acting at peril, fire, and other kindred subjects.

The volume concludes with the commentary on "Law of Fellow-Servant and Compensation" by Dean T. J. Moll, American Central Law School.

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LAW OF TORTS

INTRODUCTION

BY

WILLIAM CAREY JONES, A.B., A.M.*

FUNDAMENTAL NOTIONS.

1. **Legal rights.**—The object of law is the protection of legal rights. Legal rights are such rights as are recognized by law and enforced by the power of the state. A legal right may or may not correspond with a moral right, or it may be more or less extensive than a moral right.

The nature of a legal right is thus explained by Mr. Justice Holmes: "A legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force. Just so far as the aid of the public force is given a man, he has a legal right, and this is the same whether his claim is founded in righteousness or iniquity."[1]

A fuller conception of the idea of legal right may be gained by comparing it with the ideas of might and moral right. Such a comparison has been

* Director, School of Jurisprudence, University of California.

[1] Holmes, The Common Law, p. 214.

given by Professor T. E. Holland in the following paragraphs:

"If a man by his own force or persuasion can carry out his wishes, either by his own acts, or by influencing the acts of others, he has the 'might' so to carry out his wishes.

"If, irrespectively of having or not having this might, public opinion would view with approval, or at least with acquiescence, his so carrying out his wishes, and with disapproval any resistance made to his so doing, then he has a 'moral right' so to carry out his wishes.

"If, irrespective of his having or not having either the might or the moral right on his side, the power of the state will protect him in so carrying out his wishes, and will compel such acts or forbearances on the part of other people as may be necessary in order that his wishes may be so carried out, then he has a 'legal right' so to carry out his wishes.

"If it is a question of might, all depends on a man's own powers of force or persuasion. If it is a question of moral right, all depends on the readiness of public opinion to express itself on his side. If it is a question of legal right, all depends on the readiness of the state to exert its force on his behalf. It is hence obvious that a moral right and a legal right are so far from being identical that they may easily be opposed to one another. Moral rights have, in general, but a subjective support; legal rights have the objective support of the physical force of the state. The whole purpose of laws is to announce in what cases that objective support

will be granted, and the manner in which it may be obtained. In other words, law exists for the definition and protection of rights."[2]

2. **Legal duties.**—Every right, whether moral or legal, implies a duty on the part of some particular person or on the part of all other persons generally. This duty is either active or passive, that is to say, either the performance of an act or the forbearance from acts. When the wishes of the one having a right are advanced or furthered, actively or passively, by others, then such others owe a duty to the one having the right. Where this furtherance is enforced, or expected, by the public opinion of the community, it is a moral duty that is owed. Where the furtherance is enforced by the power of the state, it is a legal duty that is owed.

3. **Rights against particular individuals and rights against persons generally.**—Sometimes a legal right exists against one or more persons, specifically designated or capable of being ascertained; sometimes a legal right exists against all persons generally, that is to say, against all the members of the particular society or community to which the holder of the right belongs. Thus, in the case of a contract between A and B, the right of A to demand performance of the contract exists against B only; whereas, in the case of the ownership of a piece of land or of the right to personal freedom of motion, the right to hold and enjoy the land, or the right to move about freely, exists against persons generally.[3]

[2] Holland, Jurisprudence (10th ed.), p. 82.
[3] Markby, Elements of Law (3d ed.), p. 96.

This distinction between different classes of legal rights is indicated by the use of technical Latin terms: the former being called rights in personam, the latter rights in rem. These expressions are in common use and must accordingly be understood. It is the part of wisdom not to attempt to translate, as a translation is likely to mislead, especially in case of the expression, right in rem. A right in personam means a right available against a determinate individual or determinate individuals. All contractual rights, as well as some others, fall thereunder. A right in rem means a right available against persons generally, or, as frequently expressed, against the world at large. All the rights that come within the branch of law designated Torts fall within this category. Blackstone classifies rights of persons into absolute and relative rights.[4] But a sounder, more logical, and better approved classification is that into rights in rem and rights in personam.

4. **Analysis of rights falling under rights in rem and rights in personam.**—Adopting the terminology used by Professor Holland,[5] the various rights falling under the two heads of rights in rem and rights in personam, may be analyzed as follows:

A. Rights in rem:

I. To personal safety and freedom.

II. To the society and control of one's family and dependents.

III. To reputation.

IV. To advantages open to the community

[4] 1 Blackstone, Commentaries, p. 122.

[5] Holland, Jurisprudence (10th ed.), pp. 163, 238.

generally, such as the free exercise of one's calling.

V. To possession and ownership.

VI. To immunity from damage by fraud.

B. Rights in personam:

I. (a) Domestic: husband and wife, parent and child, guardian and ward.

(b) Fiduciary: trusts.

(c) Meritorious: quasi-contracts.

(d) Official: rights against ministerial officers.

II. Contracts.

5. **Definitions of tort.**—A tort is a civil injury, that is to say, it is a breach of any one of certain legal rights, for which breach the holder of the right may recover damages. Among the many definitions of a tort, no one of which is entirely satisfactory, we select the two following as best indicating the character of wrongs known as torts: "What we now understand by a tort is a breach of some duty between citizens, defined by the general law, which creates a civil cause of action."[6] "A tort is a civil wrong for which the remedy is an action for damages, and which is not exclusively a breach of contract or the breach of a trust or other merely equitable obligation."[7]

6. **Torts and crimes.**—For a better understanding of the meaning of torts it is well to compare them with crimes on the one hand, and with contracts on the other. One distinction between civil

[6] Pollock, 14 Encyclopædia of the Laws of England, p. 134.

[7] Salmond, Summary of the Law of Torts, p. 4.

and criminal wrongs depends on the nature of the remedy provided by law. A civil injury or wrong calls for the use of civil proceedings. A crime calls for the use of criminal proceedings. The object of civil proceedings is to afford redress, or damages, directly to the person whose right has been infringed. The object of criminal proceedings is to punish the wrongdoer. But there is another way of considering the distinction between civil injuries and criminal injuries, which is thus well expressed by Blackstone: "Civil injuries are an infringement or privation of the private, or civil, rights belonging to individuals, considered as individuals; crimes are a breach and violation of the public rights and duties due to the whole community, considered as a community."[8]

While the same set of circumstances will sometimes, from one point of view, constitute a tort, and from another point of view, a crime, yet the right which is violated by a tort is always a different right from that which is violated by a crime. The holder of the right in the former case is an individual, in the latter case, the state. Thus, in the case of an assault and battery, viewed as a tort, the right violated is that which every man has that his bodily security shall be respected, and for the injury done the sufferer is entitled to recover damages. But the same act may be regarded as a breach of the peace, as a menace to society, and then may be punished by the state, the wrongdoer being subject to fine or imprisonment.

[8] 4 Blackstone, Commentaries, p. 5.

7. **Torts and contracts.**—While a breach of contract is a civil injury, in a looser view of what constitutes civil injuries, it is not a tort. Breaches of contract are a distinct species of wrong, which stands apart from all other species, and is governed by a special body of law, different in many respects from that which determines other forms of civil liability.[9] "In cases of tort the duty that has been violated is general. It is owed either to all our fellow-subjects, or to some considerable class of them, and it is fixed by the law and the law alone. Here lies the difference between civil wrongs, properly so called, and breaches of contract. It is not right to break one's contract, though in cases of honest error due to the parties' intentions not being clearly expressed or otherwise, or of innocent disability preventing performance, there may be legal liability without any moral blame. But breach of contract, wilful or not, is the breach of duties which the parties have fixed for themselves. Duties under a contract may have to be interpreted or supplemented by artificial rules of law, but they cannot be superseded while there is any contract in being. The duties broken by the commission of civil wrongs are fixed by law, and independent of the will of the parties; and this is so even where they arise out of circumstances in which the responsible party's own act has placed him."[10]

8. **Conditions of liability for tort.**—The object of the law of torts is to protect each individual in the community from aggressions by his fellow men, in

[9] Salmond, Summary of the Law of Torts, p. 3.
[10] Pollock, Torts (8th ed.), p. 2.

respect to his person, his reputation, and his property. The redress which it provides for any of these rights is usually by compensation in money. Ordinarily it will happen that the jury will find that, if a man has suffered loss or damage, a right has been violated, and that if a right has been violated, damage has been suffered. But not always so. A famous legal phrase, frequently invoked, is *damnum absque injuria,* which may be translated, "damage, or loss, but no tort." It means that there are acts for which, though they cause hurt and damage to a person, the law has provided no remedy, or, in other words, that no legal right has been invaded. Thus, it is said that there may be no recovery for mental suffering apart from bodily injury. It is no tort to wound merely another's feelings, no matter how grievously he suffers. It is a question, again, on which the authorities are in conflict, whether one may recover for an invasion of his privacy, some courts holding that there is a legal right of privacy, other courts holding that there is no such right. On the other hand, there are cases in which the act of the defendant is actionable, although no material damage can be proved. In such a case, the tort is actionable per se. In all other cases, torts are actionable only on proof of actual damage having resulted from their commission. The striking instances of torts actionable per se are battery to the person and trespass on land. "The explanation of those cases in which a right of action is conferred on a person who has sustained no harm is to be found in the fact that certain acts are so likely to

result in harm that the law prohibits them absolutely and irrespective of the actual issue. We may say that in such cases the law conclusively presumes damage, because of the mischievous tendency of the act; whereas in other cases there is no presumption, and actual harm must be proved."[11]

9. **The theory of torts.**—"The theory of torts may be summed up very simply. At the two extremes of the law are rules determined by policy without reference of any kind to morality. Certain harms a man may inflict even wickedly; for certain others he must answer, although his conduct has been prudent and beneficial to the community. But in the main the law started from those intentional wrongs which are the simplest and most pronounced cases, as well as nearest to the feeling of revenge which leads to self-redress. It thus naturally adopted the vocabulary, and in some degree the tests, of morals. But as the law has grown, even when its standards have continued to model themselves upon those of morality, they have necessarily become external, because they have considered, not the actual condition of the particular defendant, but whether his conduct would have been wrong in the fair average member of the community, whom he is expected to equal at his peril. * * * The known tendency of the act, however, under the known circumstances, to do harm may be accepted as the general test of conduct.

"The tendency of a given act to cause harm under given circumstances must be determined by ex-

[11] Salmond, Summary of the Law of Torts, p. 8.

perience. And experience either at first hand or through the voice of the jury is continually working out concrete rules, which in form are still more external and still more remote from a reference to the moral condition of the defendant, than even the test of the prudent man, which makes the first stage of the division between law and morals. It does this in the domain of wrongs described as intentional, as systematically as in those styled unintentional or negligent. But while the law is thus continually adding to its specific rules, it does not adopt the coarse and impolitic principle that a man acts always at his peril. On the contrary, its concrete rules, as well as the general questions addressed to the jury, show that the defendant must have had at least a fair chance of avoiding the infliction of harm before he becomes answerable for such a consequence of his conduct. And it is certainly arguable that even a fair chance to avoid bringing harm to pass is not sufficient to throw upon a person the peril of his conduct, unless, judged by average standards, he is also to blame for what he does."[12]

10. **Actions of trespass and case.**—Modern procedure has abolished forms of action, and technical questions of procedure have lost their importance. Nevertheless the language of the old forms of action is still used, and the distinctions made therein are often useful if not necessary in determining the basis of liability in tort. It is, therefore, advisable to understand the distinction between the

[12] Holmes, The Common Law, p. 161.

action of trespass and the action of trespass on the case, or, as it is more commonly called, case. Trespass was the action used for any wrongful and direct application of force, whether to the person or property. Case was a supplementary form of action, provided for all kinds of injury which did not amount to a trespass.

"In all the books the invariable principle to be collected is, that where the injury is immediate on the act done, there trespass lies; but where it is not immediate on the act done, but consequential, there the remedy is in case. And the distinction is well instanced by the example put of a man's throwing a log into the highway; if at the time of its being thrown it hit any person, it is trespass; but if after it be thrown any person going along the road receives an injury by falling over it as it lies there, it is case. Neither does the degree of violence with which the act is done make any difference; for if a log were put down in the most quiet way upon a man's foot it would be a trespass; but if thrown into the road with whatever violence, and one afterwards falls over it, it is case and not trespass. * * * Trespass is the proper remedy for an immediate injury done one by another; but where the injury is only consequential from the act done, there it is case."[13] Where there is no physical interference with the person or property, then the action in tort is not trespass but case. For example, in deceit, malicious prosecution, or libel, the action employed is case.

[13] Leame v. Bray, 3 East 593 (Eng.).

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LAW OF TORTS

PART I

TRESPASS

BY

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CHAPTER I.

TRESPASS TO THE PERSON—BATTERY—ASSAULT—FALSE IMPRISONMENT.

1. **Trespass.**—The idea of trespass implies a direct interference with the person or property of another. The person so interfering with, or injuring, another's person or property, is usually liable for the consequences of his acts irrespective of his intention to do harm. In other classes of wrongs, liability may depend more or less upon the moral blameworthiness of the actor, but in trespass the only question is whether the act which constitutes the trespass is his own act. A person's rights of immunity with respect to his person or his property is absolute, and any direct invasion thereof by another gives rise to a right of action for damages, nominal if the injury sustained is nominal, substantial if the injury sustained is substantial.

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2. **Forms of trespass to the person.**—The security of a man's person is naturally the first object of solicitude in a regulated form of society. Violations of such security, or trespass, to the person may occur under three different forms—battery, assault, and false imprisonment. The direct application of violence to one's person constitutes battery; a display of force, indicating an intended battery, coupled with an apparent ability to commit the battery, thereby putting the person in fear of a battery, constitutes assault; while restraint of the body, in a way not lawfully justified or excused, constitutes false imprisonment.

3. **Battery.**—Lord Holt's oft-quoted dictum that "the least touching of another in anger is a battery,"[1] is frequently taken to mean that to constitute a battery there must be anger, or at least a hostile intent, on the part of the assailant. It seems rather to mean that the least touching of another will be a battery, if such touching is indeed an intrusion on a man's immunity of his person. The test whether an application of force, however slight, to another's body constitutes a battery, is probably absence of consent on the part of the plaintiff, rather than presence of hostile intent on the part of the defendant.[2] But a hostile spirit on the part of the defendant carries with it naturally a lack of consent on the part of the plaintiff, and in this sense the manner in which the touching is done tends to decide the question whether it was justifiable or

[1] Cole v. Turner, 6 Mod. 149 (Eng.), LEADING ILLUSTRATIVE CASES.
[2] Coward v. Baddeley, 4 H. & N. 478 (Eng.).

not, and, therefore, whether there was a battery or not. As instances of acts constituting a battery may be mentioned: any blow with the hand, a weapon or missile; throwing water on a person;[3] spitting in his face;[4] cutting off his hair;[5] caressing a woman by a man not holding a relation to her entitling him so to do;[6] using roughly an initiate into a secret society;[7] "smoking out" a tenant;[8] snatching a paper from the hands of another;[9] injuring another, by an unjustifiable act, while engaged in horseplay.[10] Where the defendant had authority to enter the outer door of the plaintiff's dwelling house to deliver goods, he was held guilty of a battery when he entered a bed-room and took hold of the plaintiff to wake him up in order to present a bill.[11] On the other hand, instances of touching another's body which do not amount to a battery, because not done hostilely, but done with the express or implied consent of the person touched, are: striking another on the arm or breast in discourse;[12] pushing one gently aside in a crowd or narrow passage.[13]

4. **Same subject.**—"Provoking and insulting language constitute a defense to acts of violence in a

[3] Pursell v. Horn, 8 A. & E. 602 (Eng.).
[4] Draper v. Baker, 61 Wis. 450, 21 N. W. 527.
[5] Forde v. Skinner, 4 C. & P. 439, 19 E. C. L. 494 (Eng.).
[6] Goodrum v. State, 60 Ga. 509.
[7] Kinver v. Phoenix Lodge, 7 Ont. 377 (Canada).
[8] Wood v. Young, 20 Ky. Law R. 1931, 50 S. W. 541.
[9] Dyk v. De Young, 35 Ill. App. 138.
[10] Fitzgerald v. Cavin, 110 Mass. 153; Reynolds v. Pierson, 29 Ind. App. 273, 64 N. E. 484, LEADING ILLUSTRATIVE CASES.
[11] Richmond v. Fisk, 160 Mass. 84, 35 N. E. 103.
[12] Tuberville v. Savage, 1 Mod. 3 (Eng.), LEADING ILLUSTRATIVE CASES.
[13] Cole v. Turner, 6 Mod. 149 (Eng.), LEADING ILLUSTRATIVE CASES.

civil action no more than in a criminal prosecution. The farthest that the law has gone, and the farthest that it can go, whilst attempting to maintain a rule, is to permit the high provocation of language to be shown as a palliation for the acts and results of anger; that is, in legal phrase, to be shown in mitigation of damages."[14] Drunkenness is no excuse for a tort.[15] Even the most urgent calls of family affection will not justify a trespass. Thus, where a girl was in the service of the plaintiff and was very ill in his house, the entry by the girl's mother, without permission of the plaintiff, was held to be a trespass.[16] And a husband's desire to attend the funeral of his wife, which was held in a stranger's house, gave him no right to enter the house against the will of the owner.[17] And a priest, who desires to administer the sacraments of penance to a sick person, may not on that account justify the use of force in ejecting from the room a person who is lawfully there.[18]

5. **Same subject—Intention immaterial.**—In all cases of battery the law says, in effect, that a man is conclusively presumed to intend the natural consequences of his acts. It therefore cuts no figure whether he did actually intend the consequences or not. This rule, that the question of intention is irrelevant where actual bodily injury results from a battery, may be illustrated by concrete cases. A

[14] Ireland v. Elliott, 5 Iowa 478.
[15] Reese v. Barbee, 61 Miss. 181, LEADING ILLUSTRATIVE CASES.
[16] Parlet v. Bowman, 2 Rolle, Abr., 567 (Eng.).
[17] Neilson v. Brown, 13 R. I. 651.
[18] Cooper v. McKenna, 124 Mass. 284.

and B are fighting, and one of them accidently strikes a bystander in the eye. The person injured can recover of the man who struck him, although the injury to him was unintentional; intent or the lack thereof in such a case only affecting the amount of damages recoverable.[19] A school boy recklessly discharges an arrow in the direction of another boy, who has hidden behind a basket. The latter raises his head just in time to have his eye hit and put out. The boy shooting the arrow is liable although he had no intention of shooting the plaintiff.[20] One handled his gun carelessly while shooting at a mark and shot another man. He is liable although he did not intend the actual consequence that followed.[21] One recklessly rode a bicycle against another person standing on the sidewalk. He is liable for the unintended accident.[22]

6. **Assault.**—An assault is defined as "an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented."[23] It is an attempted or inchoate battery. There must be an overt act indicating an intention to commit a battery, coupled with the capacity of carrying the intention into effect.[24] "If you direct a weapon, or if you raise your fist, within those limits which give you the means of striking, that

[19] James v. Campbell, 5 C. & P. 372, 24 E. C. L. 611 (Eng.).
[20] Bullock v. Babcock, 3 Wend. 391 (N. Y.), LEADING ILLUSTRATIVE CASES.
[21] Weaver v. Ward, 1 Hob. 134 (Eng.).
[22] Mercer v. Corbin, 117 Ind. 450, 20 N. E. 132.
[23] Cooley, Torts (3d ed.), p. 278.
[24] Read v. Coker, 13 C. B. 850 (Eng.).

may be an assault; but if you simply say, at such a distance as that at which you cannot commit an assault, 'I will commit an assault,' I think that is not an assault."[25] Instances of an assault on a man are: "striking at him with or without a weapon, or presenting a gun at him, at a distance to which a gun will carry, or pointing a pitchfork at him, standing within the reach of it, or holding up one's fist at him, or drawing a sword and waving it in a threatening manner."[26] Sometimes it is rather the fear of the violence, or battery, on the part of the plaintiff than the ability to commit the battery on the part of the defendant that is construed to make an act an assault. On this theory it is held to be an assault to present an unloaded firearm at one.[27] "It is not the secret intent of the assaulting party, nor the undisclosed fact of his ability or inability to commit a battery, that is material, but what his conduct and the attending circumstances denote at the time to the party assaulted."[28]

7. **Same subject.**—It is held to be an assault if a man makes a rush at another with apparent intention of striking him, but is stopped before he is actually within striking distance.[29] Likewise it is an assault if the defendant pursues the plaintiff with an uplifted whip, although the latter makes his es-

[25] Pollock, C. B., in Cobbett v. Grey, 4 Exch. 729 (Eng.).

[26] Bacon, Abr., Assault and Battery, A.

[27] R. v. St. George, 9 C. & P. 483 (Eng.); Beach v. Hancock, 27 N. H. 223.

[28] Commonwealth v. White, 110 Mass. 407.

[29] Stephens v. Myers, 4 C. & P. 349, 19 E. C. L. 548 (Eng.), LEADING ILLUSTRATIVE CASES.

cape.[30] Threatening to commit a battery, and showing an intention to do so, if the plaintiff breaks a condition which the defendant had no right to impose, as that the plaintiff should not open his mouth to speak, will be regarded as an assault.[31] Throwing a hatchet at a woman who has put her head out of a window, although she is not hit, is an assault.[32] Intruding on the privacy of a woman in her sleeping room is an assault.[33] Striking a horse which a person is riding or driving may be an assault on that person.[34] On the other hand, if the defendant's words or acts negative an intention to commit a battery, the act complained of cannot be held to be an assault. The classical case is Tuberville v. Savage,[35] where, it being the time of the assizes, the defendant put his hand to his sword and said, "If it were not assize time I would not take such language from you." It was held that there was no assault. And in order to constitute an assault, there must be some display of force, some movement towards a threatened battery. Accordingly one who, in order to obstruct the way, does nothing more than stand passive like a wall is not liable for an assault.[36]

8. **Same subject—Rationale of action for assault.** —The theory on which a person is protected from

[30] Martin v. Shoppee, 3 C. & P. 373, 14 E. C. L. 616 (Eng.).

[31] United States v. Richardson, 5 Cranch C. C. 348 (U. S.), Fed. Cas. No. 16,155, LEADING ILLUSTRATIVE CASES.

[32] Y. B. 22 Ass. 99, pl. 60 (Eng.).

[33] Newell v. Whitcher, 53 Vt. 589.

[34] Marentille v. Oliver, 2 N. J. L. 358.

[35] 1 Mod. 3 (Eng.), LEADING ILLUSTRATIVE CASES.

[36] Innes v. Wylie, 1 C. & K. 257, 47 E. C. L. 257 (Eng.).

assault is well explained in the following passage from the opinion of the court in a leading case: "One of the most important objects to be attained by the enactment of law and the institutions of civilized society is, each of us shall feel secure against unlawful assaults. Without such security society loses most of its value. Peace and order and domestic happiness, inexpressibly more precious than mere forms of government, cannot be enjoyed without the sense of perfect security. We have a right to live in society without being put in fear of personal harm. But it must be a reasonable fear of which we complain. And it surely is not unreasonable for a person to entertain a fear of personal injury, when a pistol is pointed at him in a threatening manner, when, for aught he knows, it may be loaded, and may occasion his immediate death. The business of the world could not be carried on with comfort, if such things could be done with impunity."[37]

9. **False imprisonment.**—"Every confinement of the person is an imprisonment, whether it be in the common prison or in a private house, or in the stocks, or even by forcibly detaining one in the public streets."[38] The unlawful application of such restraint is the tort of false imprisonment. This is a distinct wrong, although it is also naturally coupled with assault and battery. The deprivation of liberty for the time being must be complete. A partial interference with freedom of locomotion does

[37] Beach v. Hancock, 27 N. H. 223.
[38] 3 Blackstone, Commentaries, p. 127.

not amount to an imprisonment. If a man is in a house, it is an imprisonment to prevent him leaving a particular room.[39] If a warrant for a man's apprehension is shown to him, and he thereupon for the time submits himself to the officer, he becomes a prisoner though his person is not touched.[40] But if a road is blocked so that a person is compelled to retrace his steps and go by another route, he is not entitled to recover for a false imprisonment.[41]

10. **Same subject.**—While actual physical contact, or incarceration, is not necessary for imprisonment, some form of coercion, or exercise of superior force, seems essential.[42] "It is the fact of compulsory submission which brings a person into imprisonment; and impeding and threatened physical violence, which to all appearance can only be avoided by submission, operates as effectually, if submitted to, as if the arrest had been forcibly accomplished without such submission. There are cases in which a party who does not submit cannot be regarded as arrested until his person is touched; but when he does submit no such necessity exists."[43] One who is induced, by false representations, to remain at a particular place, cannot be held to be imprisoned.[44] But to tell one on a ferry that he shall not leave until a certain demand is paid, is an imprisonment if one submits through fear, though the

[39] Warner v. Riddiford, 4 C. B. (N. S.) 180 (Eng.).
[40] Grainger v. Hill, 4 Bing. N. C. 212 (Eng.).
[41] Bird v. Jones, 7 Q. B. 742 (Eng.).
[42] Goodell v. Tower, 77 Vt. 61, 58 Atl. 790, LEADING ILLUSTRATIVE CASES.
[43] Brushaber v. Stegemann, 22 Mich. 199.
[44] Payson v. Macomber, 3 Allen 69 (Mass.), LEADING ILLUSTRATIVE CASES.

person is not touched and no actual violence offered.[45] On the other hand, a boy had his foot crushed under a train, and, against the boy's protest, the train crew took him to a hospital, and there, in the presence of his uncle, his foot was amputated; and in an action for false imprisonment, it was held that there was no liability.[46] It must appear that the restraint of freedom was against the will of the person alleged to be imprisoned.[47] And false imprisonment may consist in preventing a person from going in any direction he sees proper, without detaining him in any particular spot.[48] Thus, it was held that one is imprisoned who is shadowed constantly for two weeks by detectives, so that, although he has a qualified freedom, his movements are at all times subject to the control and direction of those who are shadowing him.[49]

[45] Smith v. State, 7 Humph. 43 (Tenn.).

[46] Ollet v. Pittsburgh, C. C. & St. L. Ry. Co., 201 Pa. St. 361, 50 Atl. 1011.

[47] Herring v. Boyle, 1 C. M. & R. 377 (Eng.); Wood v. Cummings, 197 Mass. 80, 83 N. E. 318, LEADING ILLUSTRATIVE CASES.

[48] Johnson v. Tompkins, 13 Fed. Cas. No. 7416.

[49] Fotheringham v. Adams Express Co., 36 Fed. 252, LEADING ILLUSTRATIVE CASES.

CHAPTER II.

TRESPASS TO THE PERSON—PHYSICAL INJURY RESULTING FROM FRIGHT.

11. **Enhancement of damages for fright and injured feelings in cases of personal tort.**—It is universally held that, when the defendant is found guilty of a tort to the person, such as a violation of the plaintiff's right of personal security,[50] or of liberty,[51] or of reputation,[52] the jury is authorized to take into account, in the assessment of damages, the injury the plaintiff has sustained on account of wounded feelings or mental anguish. Again, where the solicitation of a woman to an immoral act has amounted to more than words and assumed the character of a technical trespass, the jury may likewise take into account, in assessing the damages for the trespass, her mental distress as well as any physical illness that may have resulted from the illegal conduct of the defendant.[53] And, generally, damages for an admitted tort to a person may be enhanced by proof of mental anguish and nervous shock caused by fright induced by the defendant's misconduct.[54]

[50] Kline v. Kline, 158 Ind. 602, 64 N. E. 9.

[51] Young v. Gormley, 120 Ia. 372, 94 N. W. 922.

[52] Swift v. Dickerman, 31 Conn. 285.

[53] Newell v. Whitcher, 53 Vt. 589.

[54] Melone v. Sierra Railway Co., 151 Cal. 113, 91 Pac. 522, LEADING ILLUSTRATIVE CASES.

12. **Physical injury induced by fright.**—Fright may be the cause of subsequent bodily ailment; and such fright may have been caused by a wilful or wanton tort or by negligence on the part of the defendant. In cases of wilful or wanton tort, it is generally agreed that there may be recovery for whatever bodily injury is traceable to the fright. In cases of negligence, some courts go to the length of denying any and all recovery for bodily injury or ailment resulting from fright. Many jurisdictions, however, differentiate the cases of bodily ailment arising from fright into those where there has been, together with the fright, a contemporaneous impact on the body, and those where there has not been such contemporaneous bodily impact. Most of such jurisdictions allow recovery for the physical injury resulting from fright where there has been a contemporaneous impact on the body, however slight the impact may be. A large number of courts refuse recovery where the bodily injury results from fright or nervous shock alone without contemporaneous impact. The grounds of decision, on which courts denying recovery for bodily injury resulting from fright alone proceed, are based on one of three theories. The first theory goes on the principle that because there can be no recovery for mere fright, there can be no recovery for the consequences of fright. The second theory is that physical injury resulting from fright caused by the negligence of the defendant is not the proximate result of the act of negligence. The third theory holds that recovery must be de-

nied for bodily injury resulting from fright on grounds of expediency, or public policy, because of the danger of encouraging fictitious or speculative claims.

13. **Same subject—Where the fright results from a wilful or wanton tort.**—It is usually conceded that there is a right to recover damages for physical injury which has resulted from fright, where the fright was caused by the wilful and deliberate tort of the defendant, or where, as in practical jokes, the defendant's acts are brought under the same head of liability. Thus, where the plaintiff, due to an assault that involved no direct physical hurt, became the victim of maniacal insanity, with illusions and hallucinations, resulting solely from the fright induced by the assault, she was allowed to recover damages.[55] A trespasser was held liable who entered the house of a woman in her husband's absence, and flourished a whip at her and addressed her with threats and abusive language, causing fright which brought on illness and miscarriage.[56] One who stealthily entered a woman's house in the nighttime, thereby committing a trespass on the husband's property, was held liable in damages to the woman for the nervous prostration which was the consequence of the fright given to her.[57] The defendant, as a practical joke, represented to a woman that her husband had lost both legs in a railway accident. She suffered a violent shock to her ner-

[55] Williams v. Underhill, 71 N. Y. Supp. 291.
[56] Brownback v. Frailey, 78 Ill. App. 262.
[57] Watson v. Dilts, 116 Iowa 249, 89 N. W. 1068.

vous system, entailing weeks of illness and suffering. She was held entitled to recover damages on the theory that the defendant was guilty as of a wilful tort.[58]

14. **Same subject—Where the fright results from negligence, together with impact on the body.**—It is the general view of the courts that if there is any impact on the body of the plaintiff, however slight, he may recover for physical injuries, even though they result from the fright which he suffered at the time of the impact, rather than from the bodily impact itself. Thus, a passenger in a railway collision is thrown against a seat, and, although not hurt by the impact, is allowed to recover for nervous shock ending in paralysis.[59] A woman is struck on the temple by an incandescent lamp globe, causing nothing more than a slight bruise. She is allowed to recover damages for a miscarriage which results from the fright and shock received at the time of the blow.[60] The situation is held to be a case of bodily impact sufficient to maintain an action, where a man is thrown out of a wagon, or is compelled to jump out, even though no external evidence of injury is found, and the only harm done consists of a nervous shock caused by fright.[61] A railway bridge fell as the plaintiff was passing under it. The court held that no recovery could be had for injuries due

[58] Wilkinson v. Downton, L. R. (1897) 2 Q. B. 57 (Eng.). See also Green v. Shoemaker & Co., 111 Md. 69, 73 Atl. 688, LEADING ILLUSTRATIVE CASES.

[59] Homans v. Boston El. R. Co., 180 Mass. 456, 62 N. E. 737.

[60] Jones v. Brooklyn Heights R. Co., 48 N. Y. Supp. 914.

[61] Warren v. Boston & M. R. Co., 163 Mass. 484, 40 N. E. 895; Armour & Co. v. Kollmeyer, 161 Fed. 78.

to fright alone, but that, if she received any direct physical injuries, as by being hit on the neck by something, or if dust from the falling debris went into her eyes, all the resultant effects to her system due to the accident are recoverable.[62]

15. **Same subject—Where the fright results from negligence, without impact on the body.**—(1) *Grounds for allowing recovery.* In discussing the subject of liability for physical illness induced by fright resulting from negligence without bodily impact, we meet with conflict in the authorities. Some jurisdictions hold that recovery may be had for illness, nervous derangement, or physical pain, resulting directly from fright or mental anguish caused by the defendant's wrongdoing.[63] This is subject to the proviso, "that the defendant would have been liable, had his misconduct caused the derangement, sickness or pain, without the intervention of the fright or mental disturbance. In order to bring a case within the foregoing proviso, the plaintiff must show, not only that defendant's conduct was wrongful towards some one, but that it was a breach of duty owing to him by the defendant."[64]

In the English case of Dulieu v. White, just cited, Kennedy, J., says: "First of all, it is argued, fright caused by negligence is not in itself a cause of action, —ergo, none of its consequences can give a cause of action. * * * With all respect to the learned

[62] Porter v. Delaware L. & W. R. Co., 73 N. J. L. 405, 63 Atl. 860.

[63] Dulieu v. White & Sons, (1901) 2 K. B. 669 (Eng.); Green v. Shoemaker & Co., 111 Md. 69, 73 Atl. 688, LEADING ILLUSTRATIVE CASES.

[64] Burdick, Tort Liability for Mental Disturbance and Nervous Shock, 5 Columbia Law Review 179.

judges who have so held, I feel a difficulty in following this reasoning. No doubt damage is an essential element in a right of action for negligence. I cannot successfully sue him who has failed in his duty of using reasonable skill and care towards me unless I can prove some material and measurable damage. If his negligence has caused me neither injury to property nor physical mischief, but only an unpleasant emotion of more or less transient duration, an essential constituent of a right of action for negligence is lacking. 'Fear,' as Sir Frederick Pollock has stated,[65] 'taken alone falls short of being actual damage, not because it is a remote or unlikely consequence, but because it can be proved and measured only by physical effects.' It may, I conceive, be truly said that, viewed in relation to an action for negligence, direct bodily impact is, without resulting damage, as insufficient a ground of legal claim as the infliction of fright. That fright—where physical injury is directly produced by it—cannot be a ground of action merely because of the absence of any accompanying impact appears to me to be a contention both unreasonable and contrary to the weight of authority."

(2) *Grounds for denying recovery.* (*a*) *Because fright alone is not an independent basis for an action.* In the leading case laying down this reason for denying recovery the court says: "Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease,

[65] The Law of Torts (6th ed.), p. 511.

blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright, or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright."[66] This argument is answered in the quotation from Justice Kennedy's opinion given in the preceding paragraph, as well as in many other cases;[67] but it is constantly used, in a considerable number of jurisdictions, as one of the grounds, though seldom as the only ground, for denying the right to recover.

(*b*) *Because the damage is too remote.* Another reason frequently given for denying the right to recover is that physical injuries cannot be regarded as the proximate result of the negligence causing the fright, and, hence, that the damages are too remote. In the leading case advancing this rule,[68] a woman, while driving, was permitted, by the negligence of a gatekeeper at a railway crossing, to drive upon the track in front of an approaching train, and barely escaped being struck by it. She suffered severe fright or nervous shock, from which resulted an illness and an impairment of memory and of eyesight. In this case, and in a similar one in New Jersey,[69] it was held that there could be no recovery. The theory on which these cases, and many others of

[66] Mitchell v. Rochester R. Co., 151 N. Y. 107, 45 N. E. 354, LEADING ILLUSTRATIVE CASES.

[67] Green v. Shoemaker & Co., 111 Md. 69, 73 Atl. 688, LEADING ILLUSTRATIVE CASES.

[68] Victorian Railway Commissioners v. Coultas, 13 App. Cas. 222 (Eng.).

[69] Ward v. West Jersey & S. R. Co., 65 N. J. L. 383, 47 Atl. 561.

wide variety of circumstance, are decided is, as expressed in the New Jersey case just cited, that "a person is legally responsible only for the natural and proximate consequences of fright in the case of a person of ordinary physical and mental vigor; and that in the general conduct of business and the ordinary affairs of life, although we are bound to anticipate and guard against consequences which may be injurious to the persons who are liable to be affected thereby, we have a right, in doing so, to assume, in the absence of knowledge to the contrary, that such persons are of average strength, both of body and of mind."

The case just cited of Victorian Railway Commissioners v. Coultas was repudiated in the later case of Dulieu v. White.[70] And the reasoning on which the decision in the Coultas case was based is thus answered by an American text-writer: "Recalling that proximate cause is probable cause, and that the proximate consequence of a given act or omission, as distinguished from a remote consequence, is one which succeeds naturally in the ordinary course of things, and which therefore ought to have been anticipated by the wrongdoer,—we must be prepared to conclude in favor of these courts which hold that injuries of this kind [miscarriages resulting from fright] are actionable. Not only will every competent physician or surgeon that can be summoned, testify that a severe fright or nervous shock has a tendency to produce a miscarriage in a pregnant woman, but it is a matter so well known that it may

[70] Dulieu v. White & Sons, (1901) 2 K. B. 669 (Eng.).

be rested upon common observation; and [illegible]n R. Co.,[76] ought to take judicial notice of such a fa[illegible] Coultas,[77]

(*c*) *For reasons of expediency or pu*[illegible]nt of one's This ground for denying recovery is se[illegible]ccord with follows in a leading Massachusetts case: [illegible]h judicial seem, therefore, that the real reason fo[illegible]t referred. damages sustained from mere fright must[illegible]ink justly thing different [than remoteness]; and it[illegible], a claim rests on the ground that in practice it is im[illegible]lly and satisfactorily to administer any other rule. The law must be administered in the courts according to general rules. Courts will aim to make these rules as just as possible, bearing in mind that they are to be of general application. But as the law is a practical science, having to do with the affairs of life, any rule is unwise if in its general application it will not as a usual result serve the purposes of justice. A n[illegible]s, rule cannot be made for each case, and there mus[illegible]s- therefore be a certain generality in rules of la[illegible]al which in particular cases may fail to meet wh[illegible]ns. would be desirable if the single case were alone [illegible]t a be considered."[72] [illegible]ing

A later Massachusetts case reiterates the view t[illegible]ous expediency is the only valid ground on which evi- covery in such cases can be denied, and declares t[illegible]h a the rule denying recovery must be confined wit[illegible] as the narrowest limits. The court says: "As has b[illegible]ght explained repeatedly, it is an arbitrary excepti[illegible]"[78] based upon a notion of what is practicable, that p[illegible]

[71] Thompson on Negligence (2d ed.), § 156. See also Green v. Shoem[illegible] & Co., 111 Md. 69, 73 Atl. 688, LEADING ILLUSTRATIVE CASES.

[72] Spade v. Lynn & B. R. Co., 168 Mass. 285, 47 N. E. 88.

wide varie[illegible]covery for visible illness resulting from
pressed in[illegible]ock alone. * * * Recognizing as we
person is logic in favor of the plaintiff when a remedy
proximate because the only immediate wrong was a
person of [illegible]he nerves, we think that when the reality
that in those is guaranteed by proof of a substantial
nary affaif the person there is no longer occasion to
pate and [illegible]ther the exception to general rules."[73]
injurious which grant recovery for illness resulting
from fright, of course, deny the validity of refusing
recovery on grounds of mere expediency. In a Mary-
land case, in refutation of the argument based on expe-
diency or policy, the court says: "The argument from
mere expediency cannot commend itself to a court
of justice resulting in the denial of a logical legal
r[illegible]t and remedy in all cases because in some a ficti-
t[illegible] injury may be urged as a real one. The appar-
a[illegible]rength of the theory of expediency lies in the
th[illegible]hat nervous disturbances and injuries are
p[illegible]nes more imaginary than real, and are some-
as to [illegible]igned; but this reasoning loses sight of the
wh[illegible], obvious fact that a nervous injury arising
thi[illegible]hat[illegible]ctual impact is as likely to be imagined as
an[illegible]re-sulting from fright without physical impact,
to [illegible]hat[illegible]at the former is as capable of simulation as
in[illegible]hin[illegible]ter."[74]
fri[illegible]een[illegible]her refutation of the argument from expedi-
te[illegible]ion,[illegible] made in a leading English case, where, after
[illegible]e-[illegible]nting on the cases of Mitchell v. Rochester

[73] Homans v. Boston El. R. Co., 180 Mass. 456, 62 N. E. 737.
[74] Green v. Shoemaker & Co., 111 Md. 69, 73 Atl. 688, LEADING ILLUSTRATIVE CASES.

Railway Co.,[75] Spade v. Lynn & Boston R. Co.,[76] and Victorian Railway Commissioners v. Coultas,[77] the court says: "Naturally one is diffident of one's opinion when one finds that it is not in accord with those which have been expressed by such judicial authorities as those to which I have just referred. But certainly, if, as is admitted, and I think justly admitted, by the Massachusetts judgment, a claim for damages for physical injuries naturally and directly resulting from nervous shock which is due to the negligence of another in causing fear of immediate bodily hurt is in principle not too remote to be recoverable in law, I should be sorry to adopt a rule which would bar all such claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claims. My experience gives me no reason to suppose that a jury would really have more difficulty in weighing the medical evidence as to the effects of nervous shock through fright, than in weighing the like evidence as to the effects of nervous shock through a railway collision or a carriage accident, where, as often happens, no palpable injury, or very slight palpable injury, has been occasioned at the time."[78]

[75] 151 N. Y. 107, 45 N. E. 354, LEADING ILLUSTRATIVE CASES.
[76] 168 Mass. 285, 47 N. E. 88.
[77] 13 App. Cas. 222 (Eng.).
[78] Dulieu v. White & Sons, (1901) 2 K. B. 669 (Eng.).

CHAPTER III.

TRESPASS TO PROPERTY.

16. **Trespass to real property.**—"Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close. For every man's land is, in the eye of the law, enclosed and set apart from his neighbor's and that either by a material and visible fence, as one field is divided from another by a hedge, or by an ideal, invisible boundary, existing only in the contemplation of the law."[79] "No man may set his foot upon my ground without my license, but he is liable to an action. * * * Every invasion of private property, be it ever so minute, is a trespass."[80] And property, in connection with the law of trespass, as in many other places in law, means no more than possession or a right of possession. Trespass may consequently be defined as an unjustifiable intrusion upon a person's possession.[81] Neither the use of force, nor the breaking through or passage over a visible boundary, nor any unlawful intention, provided the act be voluntary, is necessary to constitute a trespass for which at least nominal damages may be recovered. For instance, where there is no obvious boundary between the plaintiff's and defendant's fields, and the defendant in mowing his own grass inadvertently mows some of the plaintiff's, he is liable for a tres-

[79] 3 Blackstone, Commentaries, p. 209.
[80] Entick v. Carrington, 19 How. St. Tr. 1067 (Eng.).
[81] Clerk & Lindsell, Torts (6th ed.), p. 347.

pass.[82] It is clearly unnecessary that any real damage be done to support an action of trespass,[83] the trifling nature of the act being no defense, and, as it is said, the maxim, *de minimis non curat lex* (the law concerns not itself about trifles), has no application to the law of trespass.[84] "It is the entry that constitutes the trespass." But where a man is forced or thrown upon the land of another, he is not a trespasser, not having gone there voluntarily.[85]

17. **Same subject—The superjacent space.**—It is the theory of the law that the landowner owns above and below the surface.[86] But it is an undetermined question whether the principle means that the ownership of the land carries with it the possession of the column of air above, or merely that the landowner is entitled to complain of the occupation of the space above him which materially interferes with his enjoyment of his land. Lord Ellenborough, in 1815, raised the question whether passing over a man's land in a balloon would be a trespass. He then expressed the opinion that it was not in itself a trespass "to interfere with the column of air superincumbent on the close," although he held that a man was a trespasser who fired a gun on his own land so that the shot fell on his neighbor's land.[87]

[82] Basely v. Clarkson, 3 Lev. 37 (Eng.), LEADING ILLUSTRATIVE CASES.

[83] Sefton v. Prentice, 103 Cal. 670, 37 Pac. 641; Pfeiffer v. Grossman, 15 Ill. 53, LEADING ILLUSTRATIVE CASES.

[84] Yelloly v. Morley, 27 T. L. R. 20 (Eng.).

[85] Dougherty v. Stepp, 18 N. C. 371; Smith v. Stone, Styles 65 (Eng.), LEADING ILLUSTRATIVE CASES.

[86] This theory is expressed by the maxim, *Cujus est solum, ejus est usque ad coelum et ad inferos* (he who owns the ground possesses also to the sky and to the center of the earth.)

[87] Pickering v. Rudd, 4 Camp. 219 (Eng.).

Lord Blackburn later expressed the opinion that the balloonist would be a technical trespasser.[88] Erecting a building so that the eaves overhang another's land has been held to be a trespass.[89] And ejectment has been allowed against a company that had strung a telephone wire over the plaintiff's land.[90]

In a case in which it was held that the owner of a stallion was liable for damage done by the horse kicking and biting the plaintiff's mare through a wire fence which separated the plaintiff's and defendant's closes, Lord Coleridge said: "It seems to me sufficiently clear that some portion of the horse's body must have been over the boundary. That may be a very small trespass, but it is a trespass in law."[91] It may be doubted whether this case was not decided rather on the theory of the common law duty of the owner of cattle to keep them in than on the theory of trespass. It has, however, also been held that in a quarrel between two neighbors, where one of them reached her arm across the fence, she was guilty of a trespass. "The mere fact that plaintiff did not step across the boundary line does not make her any less a trespasser if she reached her arm across the line, as she admits she did."[92]

18. **Trespass to personal property.**—Trespass to personal property arises when there is an interference with the interest of the possessor thereof, as by

[88] Kenyon v. Hart, 6 B. & S. 249 (Eng.).

[89] Smith v. Smith, 110 Mass. 302, LEADING ILLUSTRATIVE CASES.

[90] Butler v. Frontier Telephone Co., 186 N. Y. 486, 79 N. E. 716, LEADING ILLUSTRATIVE CASES.

[91] Ellis v. Loftus Iron Co., L. R. 10 C. P. 10 (Eng.).

[92] Hannabalson v. Sessions, 116 Iowa 457, 90 N. W. 93, LEADING ILLUSTRATIVE CASES.

killing, beating, or chasing animals. To maintain trespass to goods it is only necessary that the plaintiff have possession or the right of possession.[93] Where the act complained of constituted a change of possession it is technically called an asportation, and the writ in the common law form of pleading for trespass to chattels was for a trespass de bonis asportatis (goods carried away). This writ was maintainable where the defendant exercised any authority over the goods against the will and to the exclusion of the owner or possessor by an unlawful intermeddling, although there was no manual taking or removal.[94] Such an action may be brought against a sheriff for an illegal levy or attachment on personal property.[95] The degree of force used in a dispossession is immaterial. If a horse is hitched where the owner had a right to fasten him, it is a trespass on the part of another to unhitch the horse and remove him to another post.[96] Trespass may be committed by frightening a horse so that he runs away and does damage to himself or to the harness and carriage.[97]

19. **Same subject—Question of nominal damages.**—It may perhaps be regarded as an unsettled question whether merely laying hands on another's chattel without damaging it or making a dispossession constitutes a trespass. Very slight damage, such as scratching the panel of a carriage, has been said to

[93] Cook v. Thornton, 109 Ala. 523, 20 So. 14.

[94] Wintringham v. Lafoy, 7 Cowen 735 (N. Y.), LEADING ILLUSTRATIVE CASES.

[95] Miller v. Baker, 1 Met. 27 (Mass.), LEADING ILLUSTRATIVE CASES.

[96] Bruch v. Carter, 32 N. J. Law 554.

[97] Cole v. Fisher, 11 Mass. 137.

be sufficient to make the act a trespass.[98] On this subject, whether the defendant is liable for a technical trespass to personal property when no actual damage has been done, it is said in a Vermont case: "It is true, that, by the theory of the law, whenever an invasion of a right is established, though no actual damage be shown, the law infers a damage to the owner of the property and gives nominal damages. This goes upon the ground, either that some damage is the probable result of the defendant's act, or that his act would have effect to injure the other's rights, and would be evidence in future in favor of the wrongdoer. This last applied more particularly to unlawful entries upon real property, and to disturbance of incorporeal rights, when the unlawful act might have an effect upon the right of the party and be evidence in favor of the wrongdoer, if his right ever came in question. In these cases an action may be supported, though there be no actual damage done,—because otherwise the party might lose his right. So, too, whenever one wantonly invades another's rights for the purpose of injury, an action will lie, though no actual damage be done; the law presumes damage, on account of the unlawful intent. But it is believed that no case can be found where damages have been given for a trespass to personal property, when no unlawful intent, or disturbance of a right or of possession, is shown, and when not only all probable, but all possible, damage is expressly disproved."[99]

[98] Fouldes v. Willoughby, 8 M. & W. 540 (Eng.).
[99] Paul v. Slason, 22 Vt. 231.

CHAPTER IV.

EXCUSABLE TRESPASSES—ACCIDENT—MISTAKE—LEAVE AND LICENSE.

20. **Accident—English cases.**—It has been thought that the older English cases did not allow inevitable accident to operate as an excuse in what would otherwise be a trespass. Weaver v. Ward,[1] decided in 1616, was a case where the plaintiff and defendant, members of a train band, were practicing with their firearms, and the plaintiff was hurt by the accidental discharge of the defendant's weapon. It was said, in language that gave rise to controversy as to its meaning, "no man shall be excused of his trespass except it may be judged utterly without his fault." Of course, there may have been negligence in this case on the part of the defendant. In Dickenson v. Watson,[2] decided in 1682, ostensibly following Weaver v. Ward, it was said: "In trespass the defendant shall not be excused without unavoidable necessity." In Wakeman v. Robinson,[3] decided in 1823, where the defendant ran over the plaintiff, the court, while holding that there was negligence sufficient to hold the defendant, observed that "if the accident happened entirely without default on the part of the defendant or blame imputa-

[1] 1 Hob. 134 (Eng.).
[2] Sir T. Jones 205 (Eng.).
[3] 1 Bing. 213 (Eng.).

ble to him, the action does not lie." In Holmes v. Mather,[4] decided in 1875, the defendant was out in a carriage and pair of horses, driven by the groom. The horses ran away, and in being guided around a corner to avoid running into a shop front, knocked down the plaintiff. The jury found that there was no negligence. It was held that the defendant, being entirely without blame, and using the best judgment of a reasonable man to avoid an accident, was not liable for a trespass. In Stanley v. Powell,[5] decided in 1875, Denman, J., examined all the older English cases, and came to the conclusion that it was the settled English doctrine that in cases where negligence is disproved, and the defendant is engaged in a lawful act, an action will not lie for an injury resulting by accident from the defendant's act.

21. **Same subject—American cases.**—The rule thus finally stated with clearness in England had been anticipated in Massachusetts, in 1850, by Chief Justice Shaw. The case was that of Brown v. Kendall.[6] Two dogs belonging to the plaintiff and defendant, respectively, were fighting. The defendant was endeavoring to separate them by beating them, the plaintiff meantime looking on. The defendant accidentally hit the plaintiff in the eye, severely injuring him. The court laid down this rule: "If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an

[4] L. R. 10 Ex. 261 (Eng.).
[5] (1891) 1 Q. B. 86 (Eng.).
[6] 6 Cush. 292 (Mass.), LEADING ILLUSTRATIVE CASES.

injury arising therefrom." In a later American case,[7] it is said: "For a mere accident unmixed with negligence or fault on the part of the person to whom it is attributed, no action will lie. An accident, then, which furnishes no cause of action is an inevitable occurrence, not to be foreseen and prevented by vigilance, care, and attention, and not occasioned or contributed to, in any manner, by the act or omission of the company, its agents, employees, or servants."

22. **Same subject—Meaning of accident.**—The meaning of accident, as an excuse for an act that would otherwise be a trespass, is thus explained: "When we speak of unavoidable accident, in legal phraseology, we do not mean an accident which it was physically impossible in the nature of things for the defendant to have prevented: all that is meant is, that it was not occasioned in any degree, either remotely or directly, by the want of such care or skill as the law holds every man bound to exercise."[8] A still fuller exposition of the meaning of inevitable accident is given in a leading Connecticut case: "An accident is an event which happens unexpectedly, from the uncontrollable operations of nature alone, and without human agency, as when a house is stricken and burned by lightning or blown down by tempest, or an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both; and a classification which will embrace all the cases of any authority may easily

[7] Washington, C. & A. Turnpike v. Case, 80 Md. 36, 30 Atl. 571.
[8] Dygert v. Bradley, 8 Wend. 469 (N. Y.).

be made. In the first class are all those which are inevitable, or absolutely unavoidable, because effected or influenced by the uncontrollable operations of nature; in the second class those which result from human agency alone, but were unavoidable under the circumstances; and in the third class, those which were avoidable, because the act was not called for by any duty or necessity, and the injury resulted from the want of that extraordinary care which the law reasonably requires of one doing such a lawful act or because the accident was the result of actual negligence or folly, and might with reasonable care adapted to the exigency have been avoided.

"Thus, to illustrate: If A were to burn his own house and thereby the house of B, he is liable to B for the injury; but if the house of A is burned by lightning, and thereby the house of B is burned, A is not liable; the accident belongs to the first class and was strictly inevitable or absolutely unavoidable. And if A should kindle a fire in a long unused flue in his own house which has become cracked without his knowledge, and the fire should communicate through the crack and burn his house, and thereby the house of B, the accident would be unavoidable under the circumstances, and belong to second class. But if A, when he kindled the fire, had reason to suspect that the flue was cracked, and did not examine it, and so was guilty of negligence, or knew that it was cracked and might endanger his house and that of B, and so was guilty of folly, he would be liable although the act of kindling the

fire was a lawful one, and he did not expect or intend that the fire should communicate."[9]

23. **Mistake no excuse.**—While it is now the fully accepted rule that accident will operate as an excuse in the case of all lawful acts which otherwise would be trespasses, whether to the person, to chattels, or to real property, it is the prevailing view that mistake or ignorance affords no excuse. For example, where one buys an ox and by mistake takes away the wrong ox, he is liable for a trespass.[10] And where a person went upon the land of another to get his own sheep, and by mistake took sheep which did not belong to him, the court said: "We have no doubt that the action of trespass would lie in this case. In driving off the sheep the defendant in error, without doubt, unlawfully interfered with the property of Dexter, and it has been frequently decided that to maintain trespass de bonis asportatis it was not necessary to prove actual forcible possession of property, but that evidence of any unlawful interference with, or exercise of acts of ownership over, property, to the exclusion of the owner, would sustain the action."[11] A sheriff is liable for arresting the wrong man, although the person arrested has the same name as the one named in the warrant.[12] Where two mining claims adjoin, and the owner of one of them encroaches upon the other and extracts gold quartz therefrom, although in the belief that he is working on his own property, he

[9] Morris v. Platt, 32 Conn. 75.

[10] Hobart v. Hagget, 12 Me. 67, LEADING ILLUSTRATIVE CASES.

[11] Dexter v. Cole, 6 Wis. 319.

[12] Clark v. Winn, 19 Tex. Civ. App. 223.

is liable for a trespass.[13] Notwithstanding the fact, then, as has been said, that "probably one-half of the cases in which trespass de bonis asportatis is maintained arise from mere misapprehension of legal rights,"[14] yet the rule is universal that "mistake will not excuse a trespass."

24. **Leave and license—Meaning.**—In all actions for an alleged trespass, acceptance of the risk, or consent by the plaintiff to the harm suffered, is, within limitations, a defense. The phrase, leave and license, is the common English expression to indicate this defense and corresponds to the Latin maxim, *volenti non fit injuria* (no wrong is done to one who consents). Usually, the consent of the plaintiff which the defendant pleads in action of trespass is implied consent. "The case of express consent is comparatively rare in our books, except in the form of a license to enter upon land. It is indeed in this last connection that we most often hear of 'leave and license,' and the authorities mostly turn on questions of the kind and extent of permission to be inferred from particular language or acts."[15] We are concerned here only with implied consent, and the limits thereof can best be shown by concrete illustrations.

25. **Same subject—Illustrations.**—The plaintiff sued the defendant for false imprisonment. The plaintiff had gone on board the defendant's steamboat, just before its departure, for the purpose of

[13] Maye v. Yappen, 23 Cal. 306, LEADING ILLUSTRATIVE CASES.
[14] Stanley v. Gaylord, 1 Cush. 536 (Mass.).
[15] Pollock, Torts (8th ed.), p. 160.

arresting a third person. The boat started. After a while the plaintiff found and arrested the person he was in search of. The plaintiff refused the defendant's offer to set him ashore, except on condition that the defendant would also assist in getting the prisoner ashore, which the defendant declined to do. As the steamer passed the last land before leaving the bay and putting out to sea, the plaintiff asked the defendant to stop the boat and put him ashore. The defendant refused to do so. The court said: "If the defendant was not bound to aid in the arrest and removal of the prisoner, I do not perceive that he was bound either to delay his voyage or put back his boat to enable the plaintiff to procure assistance. When the boat had arrived at the mouth of the harbor, near Sullivan's Island, the plaintiff demanded to be put ashore, which the defendant then refused; here commenced the detention of the plaintiff against his will. Was it unlawful? I think it cannot be so held; the defendant only proceeded on his voyage. His refusal to send the plaintiff ashore at that time, which would have delayed his progress and put him to trouble, was a mere nonfeasance, which, if he had been guilty of no trespass up to that time, did not render him a trespasser ab initio; it was not a positive act, incompatible with the legal exercise of the right to proceed from the wharf, the plaintiff being on board."[16]

26. **Same subject—Illustrations.**—The plaintiff tied his horse to a post at the curb, and went into an office. The defendant took off the lines. When

[16] Moses v. Dubois, Dudley 209 (S. C.).

the plaintiff returned, he demanded the lines from the defendant, who refused to give them back. The plaintiff had recently taken some small article from the defendant, and the removal of the reins seemed to have been done in the spirit of a practical joke. At the trial of the case, the trial judge said: "If the defendant will make a tender of these lines now, I will dismiss this case upon the ground de minimis non curat lex." The lines were tendered and the case dismissed. On appeal, the court said: "This disposition of the case is the error complained of in this court. The trial judge acted upon the idea that the conduct of the defendant was intended as a joke, and that the matter involved was too insignificant to claim the attention of the court. If the defendant relied upon the fact that he removed the lines by way of a joke, it was a question for the jury to decide whether the parties had been perpetrating practical jokes upon each other in such a way that the defendant had a right to believe that the plaintiff would accept this act as a joke."[17] Administration of drugs by a physician or the performance of a surgical operation is in general lawful by the consent of the patient, either express or implied. Accordingly, it has been held that the vaccination of a passenger by a ship's surgeon would not constitute an assault, if the passenger's behavior indicated consent, whatever might be his unexpressed feelings on the subject.[18]

27. **Same subject—Sports and fighting.**—Where

[17] Wartman v. Swindell, 54 N. J. L. 589, 25 Atl. 356.

[18] O'Brien v. Cunard S. S. Co., 154 Mass. 272, 28 N. E. 266.

one is injured in contests of sport, the question whether the defense of consent will avail seems to depend upon the way in which the law, or public opinion, regards the particular sport, or so-called sport. "Where one person is indicted [the views here expressed seem to govern equally in civil cases] for inflicting personal injury on another, the consent of the person who sustains the injury is no defense to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured. * * * In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defense to a charge of assault, even when considerable force is used, as, for instance, in cases of wrestling, single-stick, sparring with gloves, football, or the like; but in all cases the question whether consent does or does not take from the application of force to another its illegal character, is a question of degree depending upon circumstances."[19] Where two engage in mutual combat, such fighting being unlawful, the general rule is that consent of either participant does not deprive him of his civil remedy against the other.[20]

[19] Reg. v. Coney, 8 Q. B. D. 534 (Eng.).

[20] McNeil v. Mullin, 70 Kans. 634, 79 Pac. 168, LEADING ILLUSTRATIVE CASES.

CHAPTER V.

EXCUSABLE TRESPASSES—DEFENSE OF SELF, OF THIRD PERSONS, AND OF PROPERTY—RECAPTION OF PROPERTY.

28. **Defense of self.**—To defend one's self by force against force is a recognized right of every man, and when the defendant in a civil action can show that the plaintiff was the real aggressor, no recovery can be had for the injury suffered by the plaintiff. But the right of defense of self, or of relatives, or of property, must not be abused. The force employed to repel an attack must not be out of proportion to the necessities of the occasion.[21] It must not exceed such force as appears to a man, or rather would appear to the average reasonable man, at the time, to be necessary to protect himself against the aggression;[22] but he may be justified under such circumstances in using force although he was not actually in danger.[23] Where, in fact, the defendant was the aggressor,[24] or where he used more force than was reasonably necessary for his protection, or, after the assault had ended and danger was past, he struck or beat the plaintiff by way of revenge, he cannot succeed in a justification of self-defense.[25] Damage may be done to personal property in legitimate self-

[21] Cockcroft v. Smith, 2 Salk. 642 (Eng.), LEADING ILLUSTRATIVE CASES.
[22] Rowe v. Hawkins, 1 F. & F. 91 (Eng.); Morris v. Platt, 32 Conn. 75.
[23] Courvoisier v. Raymond, 23 Colo. 113, 47 Pac. 284.
[24] Morganstein v. Nejedlo, 79 Wis. 388, 48 N. W. 652.
[25] Ogden v. Claycomb, 52 Ill. 365, LEADING ILLUSTRATIVE CASES.

protection. Thus, if one's premises are invaded by a dog of ferocious disposition, he may kill the dog if such action seems necessary to protect himself, his family, or his property.[26] Or, where one is being attacked by a dog and in danger of being bitten, it is lawful to shoot the dog on the spot.[27] But, where a dog ran toward the defendant and snapped at him, and then, as the gun was raised, ran away, the shooting of the dog was not justified.[28]

29. **Same subject—Cross-actions.**—In a situation where the person assaulted has repelled the assailant with more force than is necessary for the purpose of self-protection, it is held that he becomes a trespasser as to the excess of force used, that both parties are then in the wrong, and that each can maintain an action against the other, the party originally assailed because of the unlawfulness of the first assault, and the original assailant because of the excess of force used by the other in defending himself. The idea that there may be a set-off is, however, sometimes expressly denied. "We think that these are not matters of set-off; that the one cannot be merged in the other; and that each party has been guilty of a wrong for which he has made himself liable to the other. There have, in effect, been two trespasses committed: the one by the assailant in commencing the assault, and the other by the assailed party in using the excessive force; and, upon principle, we do not see why the one can be an

[26] Keck v. Halstead, 2 Lutwyche 1494 (Eng.).
[27] Credit v. Brown, 10 Johns. 365 (N. Y.).
[28] Morris v. Nugent, 7 C. & P. 572, 32 E. C. L. 764 (Eng.).

answer to the other, any more than an assault committed by one party on one day can be set off against one committed by the other party on another day. The only difference would seem to consist in the length of time that has elapsed between the two trespasses."[29] But the legal possibility of cross-actions for damages is recognized. "Both parties being injured, and one having brought suit, and the other having filed a plea of set-off, we have the rather unusual instance of cross-actions for damages growing out of the same affray. While this is unusual, it is by no means legally impossible; for, even though the party first assaulted is entitled to recover for the battery, he may have used excessive force, or beyond what was necessary for his defense, and thereby so put himself in the wrong as to become liable to the defendant, although the defendant was also liable to him."[30]

30. **Defense of third persons.**—The immunity which attaches to the defense of one's self against an unlawful aggression extends, under about the same limitations, to the defense of persons closely allied to the defendant. Thus, a person is justified in using sufficient force to protect his wife, children or other members of his family, provided the circumstances be such as to induce one having reasonable judgment to intervene to prevent the infliction of injury. "His whole defense was based on whether or not he in good faith believed that one of his sons

[29] Dole v. Erskine, 35 N. H. 503.

[30] McNatt v. McRae, 117 Ga. 898, 45 S. E. 248, LEADING ILLUSTRATIVE CASES.

was then and there in danger of bodily harm about to be inflicted upon him by the plaintiff, and that he used no more force than was necessary, or appeared to him in the exercise of a reasonable judgment to be necessary, to protect his son from injury at the hands of the plaintiff."[31] This principle extends to all family relations,[32] and a child may interfere to protect his parent,[33] and a brother to protect his brother.[34] Likewise in the relation of master and servant, a servant may justify a battery in protection of his master,[35] and, apparently, a master in protection of his servant.[36]

31. **Defense of personal property.**—"In defense of my goods or possessions, if a man endeavors to deprive me of them, I may justify laying hands upon him to prevent him; and in case he persists with violence, I may proceed to beat him away."[37] Just as another's animal might be killed by one in self-defense, so such an animal may be destroyed if it threatens damage to one's chattels. A dog or cat which is in the habit of destroying rabbits in a warren may be killed while trespassing therein,[38] or minks, the property of the defendant, may be destroyed while in the act of attacking the plaintiff's geese,[39] or a sheep-killing dog, or a dog in the act

[31] Downs v. Jackson, 128 S. W. 339 (Ky.); Tompkins v. Knut, 94 Fed. 956, LEADING ILLUSTRATIVE CASES.

[32] Leward v. Basely, 1 Ld. Raym. 62 (Eng.).

[33] Drinkhorn v. Bubel, 85 Mich. 532.

[34] Mellen v. Thompson, 32 Vt. 407, LEADING ILLUSTRATIVE CASES.

[35] Seaman v. Cuppledick, 1 Owen 150 (Eng.).

[36] Fortune v. Jones, 30 Ill. App. 116.

[37] 3 Blackstone, Commentaries, p. 121.

[38] Wadhurst v. Damme, Cro. Jac. 45 (Eng.).

[39] Aldrich v. Wright, 53 N. H. 398.

of destroying the plaintiff's poultry.[40] In all such cases the defendant must show that his property was in imminent danger and that the destruction of plaintiff's chattels was reasonably necessary to protect his own.[41] It is held that one is not justified in killing trespassing animals, where the loss by their destruction is disproportionately great as compared with the harm they are doing.[42] And one may not kill his neighbor's poultry merely because they run in his lot or garden.[43] It is, also, a universal rule that mere damage to crops by trespassing animals will not justify their destruction. The one suffering loss must resort to an action for damages or to the remedy of distress.

32. **Defense of real property.**—One may protect his lawful possession of land by ejecting a trespasser. He may use force, if there is good reason for doing so, and may use such force as may be appropriate for accomplishing his purpose.[44] It is said in an old case: "There is a force in law, as in every trespass *quare clausum fregit* (because he broke the close), as if one enters into my ground; in that case the owner must request him to depart before he can lay hands on him to turn him out; for every *impositio manuum* (laying on of hands) is an assault and battery, which cannot be justified upon the account of breaking the close, without a

[40] Leonard v. Wilkins, 9 Johns. 233 (N. Y.); Throne v. Mead, 122 Mich. 273, 80 N. W. 1080, LEADING ILLUSTRATIVE CASES.

[41] Livermore v. Batchelder, 141 Mass. 179, LEADING ILLUSTRATIVE CASES.

[42] Bowers v. Horen, 93 Mich. 420, LEADING ILLUSTRATIVE CASES.

[43] Clark v. Keliher, 107 Mass. 406.

[44] Commonwealth v. Clark, 2 Met. 23 (Mass.), LEADING ILLUSTRATIVE CASES.

request. The other is an actual force, as in burglary, as breaking open a door or gate; and in that case it is lawful to oppose force to force; and if one breaks down the gate, or comes into my close *vi et armis* (by force and arms), I need not request him to be gone, but may lay hands on him immediately, for returning violence with violence; so if one comes forcibly and takes away my goods I may oppose him without any more ado, for there is no time to make a request."[45] The use of undue or improper force or violence will defeat the defendant's plea of justification. Thus, a trespasser had put up a ladder against the defendant's house and was proceeding to nail a board there when the defendant forbade him. The trespasser not desisting, the owner shook the ladder and threw the plaintiff to the ground. It was held that the force used was not justifiable in defense of the possession of land.[46]

33. **Recaption of personal property.**—"Recaption or reprisal * * * happens when any hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant; in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them, wherever he happens to find them; so it be not in a riotous manner, or attended with a breach of the peace. * * * But, as the public peace is a superior consideration to any one man's private property, * * * this natural right of

[45] Green v. Goddard, 2 Salk. 641 (Eng.).

[46] Collins v. Renison, Sayer 138 (Eng.); Newcome v. Russell, 133 Ky. 29, 117 S. W. 305, LEADING ILLUSTRATIVE CASES.

recaption shall never be exerted where such exertion must occasion any bodily contention, or endanger the peace of society."[47] "If the chattel of one man be put upon the land of another by the fault of the owner of the chattel, and not by the fault or connivance of the owner of the land, the owner of the chattel cannot enter to retake it; but if it be put there without the fault or consent of either party, the owner of the chattel may enter and take it peaceably, after demand and refusal of permission, repairing, however, any damage which may be occasioned by his entry. * * * He may lawfully enter and retake his property, where it has been wrongfully taken or received by the owner of the land."[48] The act complained of, if not justified on the ground of the recaption of a chattel, will constitute a battery or a trespass to the realty for which a person will be held liable.

34. **Same subject—Trespasses excusable.**—The plaintiff was unlawfully hunting on the defendant's land and killed some rabbits. The defendant's servants came up as he was taking them off and demanded that they be given up. On the plaintiff's refusal, the defendant's servants took the rabbits from him, with no more than necessary force. The defendant was held not liable for assault and battery.[49] A gave B a paper to read on the spot. B was about to carry it away. A was not liable for preventing him and recovering the paper.[50] A is not

[47] 3 Blackstone, Commentaries, p. 3.
[48] Chambers v. Bedell, 2 W. & S. 225 (Pa.), LEADING ILLUSTRATIVE CASES.
[49] Blades v. Higgs, 30 L. J. C. P. 347, 100 E. C. L. 713 (Eng.).
[50] Baldwin v. Hayden, 6 Conn. 453.

liable for a trespass in retaking from B, while on A's land, fruit which B has stolen from A's trees.[51] B had, by false and fraudulent representations as to his solvency, purchased a stove of A. A discovering the fraud pursued B and overtook him two miles from the place of purchase. A is not liable for a battery in repossessing himself of the stove.[52]

35. **Same subject—Trespasses not excusable.**—A had paid off a mortgage, and, B refusing to deliver up the note which he held, attempted to take it from B by force. It was held that A was not justified in his act, and he was held liable for an assault.[53] A in pursuit of one of his hens which had strayed on B's premises, assaulted B while on the latter's land. He is liable for the battery.[54] The limits of justification in recaption of property are well illustrated in the following case: The plaintiff was a bookkeeper, and fifty dollars lost money had been deducted from his salary. Subsequently he received a sum of money with which to pay the help. Acting under the advice of counsel, he took from this money the amount owing him at the time, including what had been deducted from his pay, put it in his pocket, and returned the balance to one of his employers, saying he had received his pay and was going to leave. The employers then seized the plaintiff and attempted to take the money from him. For this assault and battery the plaintiff brought suit and

[51] Hamilton v. Barker, 116 Mich. 684, 75 N. W. 133.
[52] Hodgeden v. Hubbard, 18 Vt. 504.
[53] Sabre v. Mott, 88 Fed. 780.
[54] Shellabarger v. Morris, 115 Mo. App. 566, 91 S. W. 1005, LEADING ILLUSTRATIVE CASES.

recovered judgment. In affirming the judgment the upper court said: "Unquestionably, if one takes another's property from his possession, without right and against his will, the owner or the person in charge may protect his possession, or retake the property, by the use of necessary force. He is not bound to stand by and submit to wrongful dispossession or larceny when he can stop it, and he is not guilty of assault, in thus defending his right by using force to prevent his property from being carried away. But this right of defense and recapture involves two things: First, possession by the owner; and, second, a purely wrongful taking or conversion, without a claim of right. If one has intrusted his property to another, who afterwards, honestly, though erroneously, claims it as his own, the owner has no right to retake it by personal force. The law does not permit parties to take the settlement of conflicting claims into their own hands. It gives the right of defense, but not of redress."[55]

36. **Entry upon lands to repossess them.**—"Of the same nature as the right of recaption is the right which the owner of lands has, when another is wrongfully in possession thereof, to re-enter when he may do so peacefully, and thereafter to exclude the wrongdoer therefrom. This right may exist either where one has gone into possession without right, or where one, having had an estate in, or at least lawful possession of the lands, has had his right terminated by operation of law or by the act of the owner. The chief restraint upon this rem-

[55] Kirby v. Foster, 17 R. I. 437, 22 Atl. 1111.

edy is sufficiently indicated by what has already been said; it must be had in a peaceful manner, and an actual possession, though wrongful, must not be subverted by the employment of force."[56] At common law, where possession had been taken from the owner, he could retake it by force. But as such a course often led to breaches of the peace, a statute, 5 Richard II, was enacted, which provided, "That none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner." This statute has either been re-enacted in the several states of the Union, or been recognized as part of the American common law. The effect of the statute is subject to some conflict of opinion.

37. **Same subject.**—One line of cases holds that the landlord is not warranted in employing force to expel a tenant who is holding over.[57] Other cases take the view that the Statute of Richard II and its American equivalents, providing for a criminal prosecution, do not prevent the landlord from justifying the use of force, when sued in a civil action.[58] In a recent English case it is said: "This statute [5 Richard II] creates one of the great differences which exist in our law between the being in possession and the being out of possession of land, and which gives rise to the old saying that possession is

[56] Cooley, Torts (3d ed.), p. 76.
[57] Newton v. Harland, 1 M. & G. 956 (Eng.).
[58] Sterling v. Warden, 51 N. H. 217, LEADING ILLUSTRATIVE CASES.

nine points of the law. The effect of the statute is this,—that when a man is in possession he may use force to keep out a trespasser; but, if a trespasser has gained possession, the rightful owner cannot use force to put him out, but must appeal to the law for assistance. And the result of the cases appears to me to be this, that, inasmuch as the possession of the defendant was unlawful, he can recover no damages for the forcible entry of the plaintiff. He can recover no damages for the entry, because the possession was not legally his, and he can recover none for the force used in the entry, because, though the statute of Richard II creates a crime, it gives no civil remedy. But, in respect of independent wrongful acts, which are done in the course of or after the forcible entry, a right of action does arise, because the person doing them cannot allege that the acts were lawful, unless justified by a lawful entry; and he cannot plead that he has a lawful possession. This, as it appears to me, is the result of the cases."[59] Accordingly, in this case, it was held that the plaintiff could not recover for the eviction, but could recover for the damage done to his furniture during the course of the forcible entry.

[59] Beddall v. Maitland, L. R. 17 Ch. D. 174 (Eng.), LEADING ILLUSTRATIVE CASES.

CHAPTER VI.

EXCUSABLE TRESPASSES—NECESSITY OR PUBLIC POLICY—DISCIPLINE—ABATEMENT OF NUISANCES—ARREST WITHOUT WARRANT—JUDICIAL PROCESS.

38. **Trespass to the person justified by necessity or public policy.**—"The right of personal liberty is subject to some exceptions necessary to the common welfare of society. At common law a private citizen, without warrant, may lawfully seize and detain another in certain cases. It is justifiable to hold a man to restrain him from mischief. It is lawful to interfere in an affray which endangers the lives of the combatants. * * * Under the right of self-defense, it is lawful to seize and restrain any person incapable of controlling his actions, whose being at large endangers the safety of others. But this is justifiable only when the urgency of the case demands immediate intervention. The right to exercise this summary remedy has its foundation in a reasonable necessity. A dangerous maniac may be restrained temporarily until he can be safely released, or can be arrested upon legal process, or committed to the asylum under legal authority."[60] One who in a spirit of charity tries to assist a drunken man is not liable for a battery, even though the drunken man is injured in the course of such assistance.

[60] Keleher v. Putnam, 60 N. H. 30.

39. **Trespass to property justified by necessity or public policy.**—The act that otherwise would be a trespass upon realty will be excused if it be shown that it was done on grounds of necessity or of public policy. In case of invasion by a public enemy, it is lawful for men to go upon the land of another for the purpose of resisting the enemy and to make trenches and bulwarks for the defense of the country.[61] The destruction of personal property as a war measure gives the owner no remedy;[62] nor the tearing down of a stack of dangerous chimneys of a house that has been consumed by fire.[63] The blowing up and destruction of houses is justifiable when done to prevent the spread of a conflagration.[64] Entry on another's land may be justified on the ground of necessity for the preservation of life, as where one enters to prevent the spread of fire;[65] or for the preservation of the property of a third person which is in jeopardy of being lost or destroyed by water, fire or any like danger, as the rescue of a boat cast up by a storm.[66] Where a public highway becomes impassable, as by a sudden flood, or falling of a tree, persons may pass over the adjoining land without incurring liability for trespass.[67] But where the right of way is private and conferred by special license, one is not justified

[61] Y. B., 9 Edw. IV 23, pl. 41 (Eng.).

[62] United States v. Pacific Railroad, 120 U. S. 227, LEADING ILLUSTRATIVE CASES.

[63] Dewey v. White, M. & M. 56 (Eng.).

[64] Surocco v. Geary, 3 Cal. 69.

[65] American Print Works v. Lawrence, 23 N. J. L. 590.

[66] Proctor v. Adams, 113 Mass. 376, LEADING ILLUSTRATIVE CASES.

[67] Absor v. French, 2 Show. K. B. 28 (Eng.); Campbell v. Race, 7 Cush. 408 (Mass.), LEADING ILLUSTRATIVE CASES.

in going on neighboring land.[68] In the case of emergency on shipboard, arising from a storm, it is lawful to throw the goods overboard for the purpose of lightening the vessel, if such a course seems necessary to save the ship.[69] In this event the maritime law provides that the owners of so much of the cargo as is saved by the jettison shall contribute by way of general average to make up the loss.[70]

40. **Discipline as an excuse for trespass.**—A parent, or one authorized by a parent to take charge or control of a minor child, is not liable for use of a reasonable force to secure the child's obedience.[71] On grounds of supposed expediency, a child is not allowed in some courts to sue his parent for an excessive punishment,[72] but other courts hold otherwise.[73] "The law clothes the teacher, as it does the parent, in whose place he stands, with power to enforce discipline by the imposition of reasonable corporal punishment. * * * He is not required to be infallible in his judgment. He is the judge to determine when and to what extent correction is necessary; and like all others clothed with a discretion, he cannot be made personally responsible for error in judgment when he has acted in good faith and without malice."[74] But if the punishment is cruel and excessive and beyond that required by

[68] Taylor v. Whitehead, 2 Douglas 745 (Eng.).

[69] Mouse's Case, 12 Coke 63 (Eng.).

[70] Hicks v. Palington, Moo. K. B. 297 (Eng.).

[71] Rowe v. Rugg, 117 Iowa 606, 91 N. W. 903, LEADING ILLUSTRATIVE CASES.

[72] McKelvey v. McKelvey, 111 Tenn. 388, 77 S. W. 664.

[73] Clasen v. Pruhs, 69 Neb. 278, LEADING ILLUSTRATIVE CASES.

[74] Heritage v. Dodge, 64 N. H. 297, 9 Atl. 722.

the circumstances, the schoolmaster is liable for an assault and battery.[75] In the matter of discipline of seamen, it is said: "By the common law the master has authority over all the mariners on board the ship, and it is their duty to obey his commands in all lawful matters relative to the navigation of the ship and the preservation of good order; and, in case of disobedience or disorderly conduct, he may lawfully correct them in a reasonable manner, his authority, in this respect, being analogous to that of a parent over a child, or a master over his apprentice, or scholar. Such authority is absolutely necessary to the safety of the ship, and of the lives of the persons on board; but it behooves the master to be very careful in the exercise of it, and not to make his parental power a pretext for cruelty and oppression."[76]

41. **Abatement of nuisances.**—The removal or abatement of a nuisance by a private person injured by its existence has been recognized from the early centuries of the common law. Early instances, confirmed by later decisions, where abatement by the party injured has been justified, are: tearing up stakes, which caused the existence of a pond which threatened to flood the abator's premises, although the tearing up of the stakes menaced the fall of a house; or refilling a ditch which unlawfully diverted water from a mill;[77] or demolishing a gate placed

[75] Lander v. Seaver, 32 Vt. 114.

[76] Abbott, Shipping, p. 125, quoted in Brown v. Howard, 14 Johns. 119 (N. Y.); Michaelson v. Denison, 17 Fed. Cas. No. 9, 523, LEADING ILLUSTRATIVE CASES.

[77] Y. B., 9 Edw. IV 34, pl. 10 (Eng.).

across a highway.[78] In abating a nuisance there must be no breach of the peace nor imminent peril of a breach. Thus, a house in which persons are living cannot be pulled down.[79] If, however, notice is first given to the occupant to depart and he persists in remaining, the owner of the easement may pull down the house.[80] The true theory of abatement of nuisance, it is said, is that an individual citizen may abate a private nuisance injurious to himself, when he could also bring an action, that is to say, the abatement may only be effected by the person to whom it is in fact injurious.[81] Trees, whose branches overhang the land of another, or whose roots run into the soil of another, are to that extent nuisances, and the person whose land is thereby affected may cut off the branches and roots so encroaching.[82] It has been held that a ferocious dog running at large endangering persons in the street may be killed.[83] And where a neighbor's dog comes constantly upon one's premises and seriously disturbs the comfort of the family, the person so incommoded may shoot the dog.[84] Where the plaintiff persisted in disturbing funeral services, the court said: "At the common law any person there might have removed the plaintiff; for they were all concerned in the service of God that was then performing; so that the plaintiff, in dis-

[78] James v. Hayward, Cro. Car. 184 (Eng.), LEADING ILLUSTRATIVE CASES.
[79] Jones v. Jones, 1 H. & C. 1 (Eng.).
[80] Davies v. Williams, 16 L. J., Q. B. 369 (Eng.).
[81] Brown v. Perkins, 12 Gray 89 (Mass.).
[82] Hickey v. Michigan Central R. Co., 96 Mich. 498, 55 N. W. 989.
[83] Dunlap v. Snyder, 17 Barb. 561 (N. Y.).
[84] Brill & Brill v. Flagler, 23 Wend. 354 (N. Y.); Hubbard v. Preston, 90 Mich. 221, LEADING ILLUSTRATIVE CASES.

turbing, was a nuisance to them all; and might be removed by the same rule of law that allows a man to abate a nuisance."[85]

42. **Arrest without warrant—Arrest by an officer.**—At common law a peace officer was justified in arresting, without a warrant, a person whom he had reasonable cause to suspect of having committed, or being about to commit, a felony, and in detaining him until he could be brought before a magistrate for examination.[86] The reasonable and probable grounds that will justify an officer in arresting, without warrant, one whom he suspects of felony, must be such as would actuate a reasonable man acting in good faith.[87] In order that an officer be justified in his suspicion, such suspicion must be based either upon facts or circumstances within his own knowledge or upon information imparted to him by credible third persons, and when he has no such knowledge or information, but nevertheless makes an arrest, he acts entirely outside the line of his duty and authority.[88] At common law an arrest could be made by a peace officer for breach of the peace, actual or imminent, but not for other offenses less than a felony.[89] In some American jurisdictions this common law rule has been modified to the extent of allowing a peace officer to arrest, without a warrant, one who has committed, or is in the act of committing, a misdemeanor in the presence or view of the officer.[90]

[85] Glever v. Hynde, 1 Mod. 168 (Eng.).
[86] Beckwith v. Philby, 6 B. & C. 635 (Eng.), LEADING ILLUSTRATIVE CASES.
[87] Ex parte Morrill, 35 Fed. 261.
[88] Chandler v. Rutherford, 101 Fed. 774.
[89] Quinn v. Heisel, 40 Mich. 576.
[90] North v. People, 139 Ill. 81, 28 N. E. 966.

43. **Same subject—Arrest by a private person.**—"With regard to the lawfulness of arrest and imprisonment in particular, there are divers and somewhat minute distinctions between the powers of a peace officer and those of a private citizen; of which the chief is that the officer may, without a warrant, arrest on reasonable suspicion of felony, even though a felony has not in fact been committed, whereas a private citizen so arresting, or causing to be arrested, an alleged offender, must show not only that he had reasonable grounds of suspicion, but that a felony had actually been committed."[91] If no felony has in fact been committed by any one, the arrest is illegal,[92] but if the felony has been committed, the arrest will be justified even though the person arrested is innocent.[93] A private person may justify an arrest, without a warrant, in order to prevent the commission of a felony.[94] And he may also arrest a person actually committing a breach of the peace, provided he makes the arrest at the time of the commission of the offence, but if, after the offenders have dispersed, he attempts to make an arrest without a warrant, he becomes a trespasser and is liable for the consequences of his acts.[95]

44. **Justification of officer under judicial process.**—In an alleged trespass upon the person or property it may be sought to justify the interference on the

[91] Pollock, Torts (8th ed.), p. 222; Beckwith v. Philby, 6 B. & C. 635 (Eng.), LEADING ILLUSTRATIVE CASES.

[92] Croom v. State, 85 Ga. 718, 11 S. E. 1035.

[93] Farnam v. Feeley, 56 N. Y. 451.

[94] 2 Hawkins, P. C., c. 12, § 19.

[95] State v. Campbell, 107 N. C. 948, 12 S. E. 441.

ground that the person so acting was a public officer and was acting under authority of judicial process. We have already discussed the circumstances under which an officer will be excused when acting without a warrant. With the few exceptions already considered, a ministerial officer, in order to justify an interference with another's property, must be armed with legal process which he can produce as his authority.[96] The word process is a general term and includes every writ, warrant, or other authority which purports to empower a ministerial officer to arrest a person, to enter upon or seize property, or to do any act which, if done without such authority, would constitute a trespass.[97] The result of the suit in connection with which the process was issued does not affect the officer who has acted under a valid process.[98] And the protection which the process gives to the officer extends also to those called in to assist him. It has been held, further, that a private person aiding an officer may be protected by the judicial process even in cases where the officer will not be protected.[99]

45. **Same subject—Process "fair on its face."**—"The process that shall protect an officer must, to use the customary legal expression, *be fair on its face.* By this is not meant that it shall appear to be perfectly regular, and in all respects in accord with proper practice, and after the most approved

[96] Galliard v. Laxton, 2 B. & S. 363 (Eng.).
[97] McGuinty v. Herrick, 5 Wend. 240 (N. Y.).
[98] Lashus v. Matthews, 75 Me. 446.
[99] Firestone v. Rice, 71 Mich. 377, 38 N. W. 885, LEADING ILLUSTRATIVE CASES.

form; but what is intended is, that it shall apparently be process lawfully issued, and such as the officer might lawfully serve. More precisely, that process may be said to be fair on its face which proceeds from a court, magistrate, or body having authority of law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority. When such appears to be the process, the officer is protected in making service, and he is not concerned with any illegalities that may exist back of it."[1]

The officer charged with executing the orders of any court is bound to take notice of the law and to know that his process is bad if the law will not uphold it. A few instances of process not fair on its face, leaving the officer to act at his peril, are: a warrant of arrest issued by a justice in a case which showed by its recitals that the justice had no jurisdiction;[2] process of contempt issued by an individual judge when only the court as a body had authority to issue a process of contempt;[3] process issued under an unconstitutional law.[4] There is a difference of opinion whether an officer, knowing the process to be invalid although fair on its face, may, at his discretion, or must, at his peril, execute it. It is intimated in a leading case that it is his duty to proceed and serve the process.[5] But it would

[1] Cooley, Torts (3d ed.), p. 883.
[2] Rosen v. Fischel, 44 Conn. 371.
[3] Van Sandau v. Turner, 6 Q. B. 784 (Eng.).
[4] Campbell v. Sherman, 35 Wis. 103, LEADING ILLUSTRATIVE CASES.
[5] Watson v. Watson, 9 Conn. 140.

seem that, while he may obey all process fair on its face, yet if he knows of facts invalidating it, he may, if he choose, safely refuse to execute it.[6]

46. **Same subject—Service on a person in his dwelling.**—The question frequently arises whether entry upon private grounds or buildings in order to make service of process upon a person is justified. Generally speaking, the officer may go wherever the man is in order to make service. The limitation upon this authority lies in the maxim, that every man's house is his castle, meaning thereby that a man's dwelling may not be invaded by or at the instance of a private person, or even by an officer of the law, in the service of civil process.[7] But a dwelling house may be broken open to arrest a man for treason, felony, or breach of the peace, or to serve a search warrant which particularly specifies the house, or to dispossess an occupant when the possession has been awarded to another by a competent court.[8] Likewise, an officer in the execution of private process, may break into a building which is not occupied as a dwelling house.[9] The immunity of castle in a dwelling house is confined to its outer doors,[10] and if an officer has lawfully entered the house, as through an open outer door, he may, if need be, break open inner doors in order to make service of process.[11] It may be only a part of a

[6] Davis v. Wilson, 65 Ill. 525.
[7] Kelley v. Schuyler, 20 R. I. 432, 39 Atl. 893.
[8] Semayne's Case, 5 Coke 91 (Eng.), 1 Smith, Lead. Cas. 228.
[9] Burton v. Wilkinson, 18 Vt. 186.
[10] Swain v. Mizner, 8 Gray 182 (Mass.), LEADING ILLUSTRATIVE CASES.
[11] State v. Beckner, 132 Ind. 371, 31 N. E. 950.

larger building which will be regarded as a particular individual's castle. A building may be occupied by many persons, having their separate apartments opening into a common hall, so that the rooms of the person complaining of an unlawful intrusion communicate with the hall by several doors.[12]

[12] Swain v. Mizner, 8 Gray 182 (Mass.), LEADING ILLUSTRATIVE CASES.

CHAPTER VII

TRESPASS AB INITIO.

47. **Trespass ab initio.**—If possession is taken of property, or an entry is made thereon, under authority of law, and which would be a trespass in the absence of such authority, a subsequent abuse of the authority is said to render the doer of the act a trespasser ab initio; that is to say, a trespasser from the beginning.[13] "The elements that must in fact concur to make one liable as a trespasser ab initio are these: (1) there must be an act which upon general principle is a trespass; (2) the act must be privileged in law; and (3) there must be an abuse of that privilege such that the law will withdraw its protection."[14] The original act must have been a trespass but for the justification, and the subsequent act must be an act of trespass, not a mere nonfeasance, such as a failure to pay for the wine which had been served to one at an inn;[15] an assault, however, on the innkeeper, after lawful entry, would make the offender a trespasser ab initio.[16]

[13] Malcom v. Spoor, 12 Met. 279 (Mass.), LEADING ILLUSTRATIVE CASES.

[14] 1 Street, Foundations of Legal Liability, p. 48. Mr. Justice Holmes has expressed disapproval of the doctrine of trespass ab initio: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past. I am thinking of the technical rule as to trespass ab initio, as it is called, which I attempted to explain in a recent Massachusetts case." Viz., Commonwealth v. Rubin, 165 Mass. 453, 43 N. E. 200. The Path of the Law, 10 Harvard Law Review 457, at 469.

[15] Six Carpenters' Case, 8 Coke 146 (Eng.).

[16] Markham v. Brown, 8 N. H. 523.

Instances where one is held liable as a trespasser ab initio are the following: an officer who, after lawful attachment, puts an intoxicated man in as keeper of the attached property;[17] one who, after lawfully cutting grass in a highway, unlawfully feeds it to his horse;[18] an officer, and also a creditor, who works a horse seized under an attachment;[19] one failing to feed and water cattle after lawfully impounding them;[20] one selling the whole of a chattel under a process which was against one only of several co-owners of the chattel.[21] Where the authority is from the plaintiff, as a license to enter a house, and not under an authority conferred by law, the abuse of the authority or license does not make one a trespasser ab initio.[22]

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[17] Malcom v. Spoor, 12 Met. 279 (Mass.), LEADING ILLUSTRATIVE CASES.
[18] Cole v. Drew, 44 Vt. 49.
[19] Lamb v. Day & Peck, 8 Vt. 407.
[20] Adams v. Adams, 13 Pick. 384 (Mass.).
[21] Smyth v. Tankersley, 20 Ala. 212.
[22] Allen v. Crofoot, 5 Wend. 506 (N. Y.), LEADING ILLUSTRATIVE CASES.

LAW OF TORTS

PART II

CONVERSION

BY

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CHAPTER I.

INTRODUCTION—DEFINITION.

1. **Actions for wrongful taking of personalty.**—There were four actions at common law, which lay for the wrongful taking or detention of the personal property of another,—*trespass de bonis asportatis* (commonly called trespass de bonis), that is, for goods carried away, replevin, detinue and trover.[1] These actions differed, one from another, not only in the elements of the wrongful act complained of, but also in the result sought to be obtained by the plaintiff.

2. **Replevin.**—In replevin, the plaintiff seeks to recover the chattel specifically, and this action differs from trespass in that, in trespass, the plaintiff seeks to recover damages for the wrongful act of

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[1] Burroughes v. Bayne, 5 H. & N. 296 (Eng.), LEADING ILLUSTRATIVE CASES.

taking. As stated by Coleridge, J., in Mennie v. Blake,[2] "The whole proceeding of replevin, at common law, is distinguished from that in trespass in this, among other things, that, while the latter is intended to procure a compensation in damages for goods wrongfully taken out of the actual or constructive possession of the plaintiff, the object of the former is to procure the restitution of the goods themselves; and this it effects by a preliminary *ex parte* (that is, at the complaint of one party) interference by the officer of the law with the possession. This being done, the action of replevin, apart from the replevin itself, is again distinguished from trespass by this, that, at the time of declaring, the supposed wrongful possession has been put an end to, and the litigation proceeds for the purpose of deciding whether he, who by supposition was originally possessed, and out of whose possession the goods were taken, and to whom they have been restored, ought to retain that possession, or whether it ought to be restored to the defendant."

At common law, both in replevin and in trespass, there must have been a wrongful taking, and if the taking of the goods was rightful, neither action would lie even though the defendant wrongfully detained the goods after his right to hold them had been determined.[3] There was an exception to this rule, however, in replevin, in case of cattle taken, damage feasant (doing damage).[4] And in modern

[2] 6 E. & B. 842 (Eng.).
[3] Dame v. Dame, 43 N. H. 37; Mennie v. Blake, 6 E. & B. 842 (Eng.).
[4] 3 Blackstone, Commentaries, p. 151 (2 Cooley, 4th ed., p. 967).

times, generally by statutory modification, replevin will lie, whether the original taking was rightful or not, that is to say, this action will lie either upon a wrongful taking, or upon a rightful taking, as by a loan, and a subsequent wrongful detention.[5] Trespass, however, will lie only where there is an unlawful taking or disturbance, or interruption, of the plaintiff's possession, actual or constructive.[6]

3. **Detinue.**—The action of detinue lay to recover goods, together with damages for detaining them, where the original taking was rightful.[7] This action has generally fallen into disuse, not only because the method of trial, at common law, was unfavorable to the plaintiff, but also because the plaintiff can better accomplish his object, whether it be to recover the goods specifically, or the value of them, by the action of replevin or by that of trover.[8]

Of these four actions, replevin, trespass and detinue are of the oldest,—these actions being in use prior to the Statute 13 Edward I, Ch. 24 (1285), known as the Statute of Westminster II. Under the provisions of this statute grew up the action of trespass on the case, of which the action of trover is an offshoot.

4. **Trover—History.**—The action of trover, or,

[5] Dame v. Dame, 43 N. H. 37, and cases cited. Baker v. Fales, 16 Mass. 147. Lord, J., in Whitman v. Merrill, 125 Mass. 127: "Replevin lies for an unlawful detention, although the original taking was lawful."

[6] Fouldes v. Willoughby, 8 M. & W. 540 (Eng.), LEADING ILLUSTRATIVE CASES.

[7] Dame v. Dame, 43 N. H. 37.

[8] Burroughes v. Bayne, 5 H. & N. 296 (Eng.), LEADING ILLUSTRATIVE CASES. Bigelow, Torts (8th ed.) p. 391. 3 Blackstone, Commentaries, p. 152 (2 Cooley, 4th ed., p. 967, 968).

technically, trover for conversion, is an action to recover the value of personal property. The early forms of declarations in trover contain the allegation that the plaintiff had lost the goods and that the defendant had found them, and had refused, after a demand, to deliver them to the plaintiff, but had converted them to his own use.[9] The action derives its name from this allegation of finding (trouver).[10] Lord Mansfield, in the case of Cooper v. Chitty,[11] speaking of the action of trover, says: "In form, it is a fiction; in substance a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies, and has been brought in many cases, where, in truth, the defendant has got the possession lawfully. Where the defendant takes them wrongfully and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass, and admits the possession to have been lawfully gotten. Hence, if the defendant delivers the thing upon demand, no damages can be recovered in this action for having taken it."[12] The meaning is that the early allegation of losing and finding, which has generally disappeared under modern pleading,[13] was considered a fiction and was not traversable; no issue could be raised upon it. "The

[9] Shipman, Common Law Pleading, Appendix, 506.

[10] Chitty, Pleading (9th Am. ed.), p. 145.

[11] 1 Burrows 20 (Eng.).

[12] Cooper v. Chitty, 1 Burr. 20 (Eng.). Compare Royce v. Oakes, 20 R. I. 252, 38 Atl. 371.

[13] See, however, Gaskill v. Barbour, 62 N. J. L. 530, 41 Atl. 700, and allegations of declaration, as stated in the opinion of the court.

whole tort," says Lord Mansfield, "consists in the wrongful conversion. Two things are necessary to be proved to entitle the plaintiff to recover in this kind of action: First, property in the plaintiff;[14] and, secondly, a wrongful conversion by the defendant."

5. **Conversion defined.**—Before proceeding with the discussion of the elements of this action, it should be observed that the term "conversion" is misleading. It is a technical expression and as used in the law of torts, in respect to actions of trover, does not necessarily imply that the property has been changed in form. In fact, in probably a vast majority of cases of conversion, no change of the form, or destruction, of the property has taken place. The expression means that the defendant has exercised a wrongful dominion or control over the property in violation of the plaintiff's rights.[15]

6. **Meaning of "converted to his own use."**—It should be observed further that the expression "converted to his own use" is also a technical expression. It is quite immaterial whether or not the defendant's acts of dominion over the plaintiff's property are beneficial to the defendant. In McPheters v. Page,[16] the court stated the law, in this respect, as follows: "It is not necessary to a conversion that it be shown that the wrongdoer has applied it (the property) to

[14] "Property" here is used in a very general sense; as will be pointed out later, it is not necessary that the plaintiff be an owner of the property; bare possession or right of possession is sufficient as against a wrongdoer.

[15] Burroughes v. Bayne, 5 H. & N. 296 (Eng.), LEADING ILLUSTRATIVE CASES.

[16] 83 Me. 234, 22 Atl. 101. Compare Bristol v. Burt, 7 Johns. 254 (N. Y.).

his own use. If he has exercised a dominion over it in exclusion, or in defiance of, or inconsistent with, the owner's right, that in law is a conversion, whether it be for his own or another person's use." In this case one carcass and two saddle of deer, belonging to the plaintiff, were wrongfully taken by the defendant, who skinned them and cut them into steaks and roasts, which he gave away; he used none of the meat himself, nor did he sell any of it. The Court held that the defendant was liable in conversion.

7. **Distinction between trespass and trover.**—As already pointed out these actions differ in the damages sought to be recovered. They differ also in this respect that, in trespass, the taking must be wrongful, while in trover, it is immaterial whether the original taking was wrongful or rightful, if there is a wrongful detention; that is, if there is a wrongful taking of the goods by the defendant, trespass and trover are concurrent remedies; if the taking is rightful, but there is a wrongful withholding, trover alone will lie,—trespass de bonis cannot be maintained.[17]

There is a further distinction between these actions, in cases of wrongful takings. Trespass involves merely a wrongful taking or removal of the property, its essential feature is an interruption of the possession of the plaintiff. To constitute a conversion, however, there must be something more than a mere interruption of possession,—some repudiation of the plaintiff's rights to the property,

[17] Cases in previous notes.

or usurpation of dominion or control over it, or some act done having the effect of changing the form or quality of the thing.[18]

For example, A, a land-owner, made a contract with B, whereby B was to build a house on A's land, B having, of course, a license to enter on A's land and place materials thereon. While B was building the house, A requested him to remove some of the building material, stored on the land, to another part thereof, and, on B's refusal, A removed the material. In an action for conversion it was held that B could not recover, even though he had a right to have the material remain where he had placed it. The court said, "The evidence negatived a conversion of the property by the defendants, and showed that they claimed no title to it, assumed no dominion over it, and did nothing in derogation of the plaintiff's title to it. * * * If the plaintiff had the right to occupy the land which he claimed, the act of the defendants was wrongful, and they would be liable to the plaintiff for damages for breach of contract, or for trespass, but not for the value of property converted to their own use."[19]

Again, A embarks on B's ferry with two horses and so misbehaves that B requests him to leave the ferry; on A's refusal B takes the horses from A and puts them on the slip, from which they are driven to the highway. They are subsequently cared for

[18] Woodside v. Adams, 11 Vroom 417 (N. J.); Montgomery Water Power Co. v. Chapman & Co., 126 Fed. 68, 72. Opinion of Brett, J., in Hollins v. Fowler, L. R. 7 H. L. 757 (Eng.).

[19] Shea v. Milford, 145 Mass. 525. Compare Bruch v. Carter, 3 Vroom 554 (N. J.).

by X, who sells them at auction to pay the expenses of their keep. B is not liable to A in conversion, whether or not A's misconduct justified B in removing the horses; though it is plain if B were not justified in removing the horses, he would be liable in trespass.[20]

[20] Fouldes v. Willoughby, 8 M. & W. 540 (Eng.), LEADING ILLUSTRATIVE CASES. Compare Wellington v. Wentworth, 8 Met. 548 (Mass.).

CHAPTER II.

NATURE OF CONVERSION.

8. **Nature of act.**—To constitute a conversion the act must be such as to indicate an assertion of ownership or title, or of a right of control or dominion over the property, adversely to the owner; for example, a sale [21] or letting [22] of the goods, or a destruction [23] of them, are of themselves acts of conversion; so also if the defendant wrongfully refuses to deliver the goods to the plaintiff.[24] These are unequivocal acts of ownership; such conduct accordingly constitutes acts of conversion. They are, however, only instances. Conversion may be proved by evidence of any act which is an act of dominion or control, implying ownership, though falling short of the acts stated. For example, the plaintiff delivered some ashes to the store of one W, and applied to the defendant, collector of the port, for a clearance; the defendant refused a clearance, and unjustifiably stationed an armed guard over W's store, telling the plaintiff that he would not be allowed to remove the goods until he had given a bond in double the value, conditioned that the plaintiff should transport them to a designated port. The court said: "In the pres-

[21] Consolidated Co. v. Curtis, 1892, 1 Q. B. 495 (Eng.).

[22] Gilmore v. Newton, 9 Allen 171 (Mass.).

[23] McPheters v. Page, 83 Me. 234, 22 Atl. 101.

[24] Smith v. Durham, 127 N. C. 417, 37 S. E. 473. "One in lawful possession of another's property after demand and refusal is in no better position than if his original possession had been wrongful."

ent case there were the highest and most unequivocal acts of dominion and control over the property, not only in claiming jurisdiction over it, but in placing armed men near it, to prevent its removal. This fact is, of itself, a conversion."[25]

Again, A hired a horse from B, to drive to a designated place. He intentionally drove the horse beyond that place to another. This constitutes a conversion. "Such use of the property is so substantial an invasion of the owner's rights, and so inconsistent with the idea of an existing bailment, that the bailee cannot reasonably object to the bailor's treating the bailment as terminated thereby or to his proceeding against the bailee for a conversion."[26]

And the same result will follow if the hirer wilfully drives a horse so immoderately or violently as to cause its injury or death.[27]

[25] Bristol v. Burt, 7 Johns. 254 (N. Y.). Compare England v. Cowley, L. R. 8 Exch. 126 (Eng.).

[26] Woodman v. Hubbard, 25 N. H. 67; Homer v. Thwing, 3 Pick. 492 (Mass.); Freeman v. Boland, 14 R. I. 39. Compare Doolittle & Sherman v. Shaw, 92 Ia. 348, 60 N. W. 621. There is a conflict of authorities upon this question—whether departure from the contract, of itself, creates liability in conversion. Some of the cases hold that a material departure, of itself, terminates the bailment and renders the bailee liable for the value, whether or not the departure caused damage. Other courts make the liability turn upon the question whether loss was caused by the departure. See Carney v. Rease, 60 W. Va. 676, 55 So. E. 729, holding that liability turns upon the question of loss, and citing authorities on both sides. See also 3 Am. & Eng. Ency. 12 (2d ed.), p. 752; also Harvey v. Epes, 12 Grat. 153 (Va.), for discussion.

In Spooner v. Manchester, 133 Mass. 270, in which the defendant inadvertently, and by mistake, took the wrong road, thereby materially increasing the distance of the journey for which he had hired the plaintiff's horse, the court held that there was no conversion, on the ground that the defendant's act indicated no intention to assume any control or dominion over the horse against the rights of the owner.

[27] Wentworth v. McDuffie, 48 N. H. 402; Carney v. Rease, 60 W. Va. 676, 55 S. E. 729.

9. **Wrongful taking.**—It should be observed that the wrongful taking is not confined to a taking by force. It is equally a conversion to obtain goods by false representations. For example: B purchased from A certain goods by means of false and fraudulent representations; and the goods are then delivered to B. B is liable to A in trover for conversion, without any demand being made for the goods before suit; B obtained the goods wrongfully. "Such a sale * * * may be avoided by the vendor, and he may insist that no title passed to the vendee * * * and in such case the seller may maintain replevin or trover for his goods."[28]

10. **For what property trover will lie.**—Trover may be maintained for the conversion of every species of personal property, of value, which is the subject of private ownership. It can be maintained not only for such tangible property as furniture,[29] cattle,[30] implements and tools,[31] merchandise,[32] books,[33] but also for a promissory note,[34] bank bills

[28] Thurston v. Blanchard, 22 Pick. 18 (Mass.). Compare Baird v. Howard, 51 Ohio St. 57, 36 N. E. 732. (The defendant purchased the goods from the plaintiff, while the latter was so intoxicated as not to know what he was doing.) See Cooley, Torts (Students' ed.), pp. 426, 427.

[29] Gordon v. Harper, 7 T. R. 9 (Eng.); Howitt v. Estelle, 92 Ill. 218 (sewing machine); McPartland v. Read, 11 Allen 231 (Mass.); Sargent v. Gile, 8 N. H. 325.

[30] Merz v. Chic. & N. W. R., 86 Minn. 33, 90 N. W. 7.

[31] Frome v. Dennis, 45 N. J. L. 515 (plow).

[32] Armory v. Delamirie, 1 Strange 505 (Eng.), (jewel); Farrant v. Thompson, 5 B. & Ald. 826 (Eng.), (machinery); Ashton v. Allen, 70 N. J. L. 117 (oats), LEADING ILLUSTRATIVE CASES.

[33] Pease v. Smith, 61 N. Y. 477.

[34] Smith v. Durham, 127 N. C. 417, 37 S. E. 473; Laverty v. Snethen, 68 N. Y. 522. Castle v. Corn Exchange Bank of England, 75 Hun 89 (N. Y.) (bill of exchange).

or money,[35] bonds,[36] or valuable papers.[37] In one case[38] trover was maintained for the conversion of a letter, and in another[39] the action was for conversion of a box of negatives and photographic prints.

11. **Nature of plaintiff's right in the property.**—The courts not infrequently, in discussing the action of conversion, speak of the plaintiff's ownership or title; especially is this true in definitions of conversion. The implication that the plaintiff must be the owner, however, is not warranted. If the plaintiff is an owner, he may maintain the action, provided, of course, he can prove the conversion, and provided, further, that he had the possession or right of possession of the goods at the time of the conversion. But a less interest than that of absolute ownership will suffice. A lessee or bailee of property may maintain trover against one who wrongfully converts it; and, in fact, any person who has possession, or the right of possession, may maintain the action.

For example: A delivered goods to B under a contract by the terms of which B was to become the owner of them when the purchase price was fully paid; until then the goods were to remain the property of A, and there was a provision in the contract that the goods were not to be removed or sold by B until they were paid for. Before B had completed payment of the purchase price, he sold them to C,

[35] De la Chaumette v. Bank of England, 2 B. & A. 385 (Eng.).

[36] Donald v. Suckling, L. R. 1 Q. B. 585 (Eng.).

[37] Swim v. Wilson, 90 Cal. 126 (shares of stock); Spooner v. Holmes, 102 Mass. 503 (coupon).

[38] Teal v. Felton, 12 Howard 284 (U. S.).

[39] Wamsley v. Atlas S. S. Co., 168 N. Y. 533, 61 N. E. 896.

who took possession of them. This was held a conversion by C (as it was also by B) and A was held entitled to maintain the action, though not in possession at the time of conversion.[40]

Again: A leases certain personal property to B, and the property is delivered into the possession of B under the lease. During the term of the lease the property is wrongfully taken from B by C by acts amounting to a conversion. B is entitled to maintain an action of trover, and A is not, though A is the owner of them. B has the possession and right of possession, even against A.[41]

12. **Same subject—Possession or right of possession.**—A more accurate statement of the nature of the right which a plaintiff must prove, is contained in the opinion of the court in Raymond Syndicate v. Guttentag:[42] "It is settled that to maintain tort under a declaration like the present one (trover) the plaintiff must show possession or the right to immediate possession." Even an "owner of chattels could not maintain trover for their conversion unless when the acts complained of were done he had possession or right to immediate possession";[43] and if the plaintiff can show either, he may maintain the action against a wrongdoer, whatever may be his right to the possession as to other persons.

In Armory v. Delamirie[44] the plaintiff, a chimney-

[40] Carter v. Kingman, 103 Mass. 517.

[41] Gordon v. Harper, 7 T. R. 9 (Eng.); Raymond Syndicate v. Guttentag, 177 Mass. 562; Stowell v. Otis, 71 N. Y. 36; Bartlett v. Hoyt, 29 N. H. 317.

[42] 177 Mass. 562.

[43] Raymond Syndicate v. Guttentag, 177 Mass. 562.

[44] 1 Strange 505 (Eng.).

sweeper's boy, found a jewel and carried it to the defendant, a jeweler, who took out the stones and gave back the socket, refusing to give up the stones upon demand. The court held that the plaintiff had a right of possession, as against the defendant, and could maintain trover, though obviously the plaintiff had no title to the jewel as against the owner who had lost it. In Anderson v. Gouldberg,[45] which was an action of trover for the value of certain logs, the defense was that the plaintiff had obtained the logs by trespassing on the land of a third person, and that he had no title to them. The court held this was no defense. Mr. Justice Miller said: "One who has acquired the possession of property, whether by finding, bailment, or by mere tort, has a right to retain that possession as against a mere wrongdoer who is a stranger to the property. Any other rule would lead to an endless series of unlawful seizures and reprisals in every case where property had once passed out of the possession of the rightful owner."[46]

The cases of McAvoy v. Medina[47] and Bridges v. Hawkesworth[48] are excellent illustrations of the rule under discussion. In the former case the plaintiff, a customer in the defendant's barber-shop, found a purse on a table in the shop under circumstances indicating that another customer had left it there. The plaintiff delivered the purse to the defendant, tell-

[45] 51 Minn. 294, 53 N. W. 636.

[46] See also Averill v. Chadwick, 153 Mass. 171; Stonebridge v. Perkins, 141 N. Y. 1, 5, 35 N. E. 980; Stevens v. Gordon, 87 Me. 564, 33 Atl. 27. But compare Boyce v. Williams, 84 N. C. 275.

[47] 11 Allen 548 (Mass.).

[48] 21 L. J., Q. B. 75 (Eng.).

ing him to return it to the owner if he called for it. No one having claimed the purse, the plaintiff demanded it of the defendant, who refused to deliver it up. In an action of trover, it was held the plaintiff could not recover. The facts in Bridges v. Hawkesworth were similar, except that the property, a parcel containing bank-bills, was found on the floor of the defendant's shop by the plaintiff. There was the same delivery to the defendant, non-claim by the owner, and refusal to deliver up to the plaintiff on demand. This was held to be a conversion. The two cases, however, are consistent. In the McAvoy case, the court held that the possession of the purse and right of possession, except as to the owner, was in the shop-keeper, the reasoning being that, inasmuch as the purse was on the table, it was not lost, but had been placed there by the owner, thus placing it in the possession of the shop-keeper. In the Bridges case, the parcel was lost property, and the plaintiff was the finder, and hence entitled to maintain his action under the rule laid down in the case of Armory v. Delamirie.[49]

These are cases where either of two persons may maintain trover for the same wrongful conversion, that is to say, one may have the possession and the other the right of possession. For example: If A entrusts B with personal property under such circumstances that A is entitled to reclaim the goods at any time, and C wrongfully takes the goods from B, either A or B may maintain trover for the conversion. B has possession, which is good as against

[49] 1 Strange 505 (Eng.).

C, a wrongdoer. A has immediate right of possession, which is also good as against C.[50]

13. **Intent—Bad faith.**—There is much confusing language in the books upon the question of the necessity of proof of intent in this action. "Liability for converting the goods of another to one's own use," says Dr. Bigelow,[51] "does not depend upon the intent of the party exercising the act of dominion." On the other hand, Parke, B., in Simmons v. Lillystone[52] says, "In order to constitute a conversion there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it." Again in Spooner v. Holmes,[53] Mr. Justice Gray says that an action of trover "cannot be maintained without proof that the defendant either did some positive wrongful act with the intention to appropriate the property to himself or to deprive the rightful owner of it, or destroyed the property."

Much of the confusion has arisen from a failure to distinguish between the *necessity* of proof of intention and the *evidence* required to prove it. It seems clear that, although in many cases of conversion the evidence is of such a nature that the act itself constitutes sufficient proof of intention, it is necessary to prove an intent to convert. For example: In Spooner v. Manchester,[54] the act of departing from

[50] Marsden v. Cornell, 62 N. Y. 215, 221, 222. Vining v. Baker, 53 Me. 544.

[51] Bigelow, Torts (8th ed.), p. 397.

[52] 8 Exch. 431 (Eng.).

[53] 102 Mass. 503.

[54] 133 Mass. 270.

the contract of hiring was equivocal; it might have been done with intent to deprive the owner of the goods, or, as was actually the fact, it might have been the consequence of an honest mistake and with no intent to deprive the owner.

In Wellington v. Wentworth,[55] the defendant was driving a drove of cattle along the highway, and the plaintiff's cow joined the drove, and was driven with it by the defendant to New Hampshire and pastured there, during the season; in the autumn, on the return of the drove to Massachusetts, the defendant returned the cow to the plaintiff. It was held there was no conversion on the ground that the defendant did not know that the cow had joined the drove. "Yet if the defendant had driven the cow to New Hampshire and pastured her there, knowing that she belonged to the plaintiff and intending to deprive him of her, there can be no doubt that it would have been a conversion."[56]

14. **Same subject—Intent to convert.**—"Intent to convert" does not necessarily mean that the plaintiff must prove that the defendant had a conscious purpose to deprive some particular person of his ownership or dominion; nor does it mean that the plaintiff must prove knowledge of his rights on the part of the defendant in all cases. If the defendant's act is of such a nature as, of itself, indicates an intention inconsistent with, or in violation of, the plaintiff's right, this is sufficient evidence of intent.[57]

[55] 8 Met. 548 (Mass.).
[56] Field, J., in Spooner v. Manchester, 133 Mass. 270, 274.
[57] England v. Cowley, L. R. 8 Ex. 126 (Eng.).

For example: B innocently purchases goods from A who has stolen them from C, B taking possession of the goods under the sale. This is a conversion; B's act is consistent only with intent to deprive all the world of the goods and hence, with intent to convert.[58]

It is commonly said that where the defendant's act is an unequivocal act of dominion, no other evidence is required to establish a conversion.[59] Such language is consistent with the proposition under discussion; such an act is conclusive of the intent to convert. On the other hand, if the act is equivocal, consistent either with intent to convert or the absence of it, further evidence of the intent is required.

"If a person wrongfully exercises acts of ownership or of dominion over property under a mistaken view of his rights, the tort, notwithstanding his mistake, may still be a conversion, because he has both claimed and exercised over it the rights of an owner; but whether an act involving the temporary use, control or detention of property implies an assertion of a right of dominion over it, may well depend upon the circumstances of the case and the intention of the person dealing with the property."[60] If A wrongfully takes the goods of B, by acts amounting to a conversion, and temporarily places them in the hands of C, as a mere bailee or depos-

[58] Galvin v. Bacon, 11 Me. 28. Intent to convert means, then, no more than that the defendant has, by conduct or otherwise, claimed or exercised the right of an owner. Spooner v. Manchester, 133 Mass. 270, 274.

[59] Pease v. Smith, 61 N. Y. 477. In fact, in this case the court says that knowledge and intent are immaterial. The truth is that knowledge was immaterial and intent *was proved.*

[60] Field, J., in Spooner v. Manchester, 133 Mass. 270, 274.

itary, C is not liable to B if he acted innocently, even though he subsequently redelivers the goods to A. He would be if he knew that A had wrongfully taken them from B, or if he should refuse to deliver them to B upon demand.[61] So if A wrongfully, and by acts amounting to a conversion, takes the goods of B, and delivers them to a common carrier, who transports them at A's direction to a designated place and there delivers them as A orders, the carrier is not, so far, liable in conversion to B.[62] But if the owner, B, demands the goods from the carrier, the latter is liable in conversion, if he refuses to deliver them up.[63] The explanation is that the temporary possession by the innocent agent, bailee or carrier, is an equivocal act consistent with recognition of the true ownership, so long and only so long as the agent, bailee or carrier exercises no other act which is inconsistent with such recognition. If he assumes so to act, as by a sale,[64] a letting, a destruction, or an absolute refusal to deliver up upon demand by the true owner, he acts at his peril, and is liable in conversion, notwithstanding his innocence or lack of knowledge of the true owner's right. Intent to convert is quite consistent with lack of knowledge of another's rights in the goods, as well as with innocence, so far as the question of conscious wrong-

[61] Loring v. Mulcahy, 3 Allen 575 (Mass.); Hudmon v. DuBose, 85 Ala. 446, 5 So. 162; Leonard v. Tidd, 3 Met. 6 (Mass.); Greenway v. Fisher, 1 C. & P. 190 (Eng.); Leuthold v. Fairchild, 35 Minn. 99; Frome v. Dennis, 45 N. J. L. 515.

[62] Gurley v. Armstead, 148 Mass. 267, LEADING ILLUSTRATIVE CASES.

[63] Atch., Topeka & Santa Fe R. R. v. Jordan Co., 67 Kan. 86, 72 Pac. 533; Cooley, Torts (Students' ed.), p. 429.

[64] Robinson v. Bird, 158 Mass. 357 (sale by auctioneer).

doing is concerned. If A buys goods from B, supposing and having reasonable grounds to suppose that B is the owner, A considers himself the owner of the goods to the exclusion of all other persons. A exercises dominion over the goods as an owner; and while he may not and probably does not consciously intend to deprive any person wrongfully of his property, it cannot be said that A's control of such property is other than as an owner of it. If it turns out that B had no title but that C is the real owner C may hold A liable.

Bad Faith. From what has just been said it will be perceived that, apart from the question of title acquired by innocent purchase,[65] bad faith is not an essential element of the wrong in actions for conversion. Of course, if the plaintiff can prove that the defendant has exercised dominion over the plaintiff's property, with knowledge of the plaintiff's rights therein and with conscious purpose, a clear case of conversion, or even larceny, is made out. The point is, however, that a defendant who has exercised acts of dominion and control over another's property, is liable in trover for the value, even though such acts were exercised in a mistaken and innocent belief that no one had any claim on the property, superior to his own.[66]

15. **Demand and refusal.**—Much of the litigation in trover cases has involved the question whether the suit could be maintained without proof that the

[65] §§ 20-23, inclusive.

[66] Cases above; Ashton v. Allen, 70 N. J. L. 117, LEADING ILLUSTRATIVE CASES. Compare Cernahan v. Chrisler, 107 Wis. 645, 83 N. W. 778 (conversion by innocent agent); Stephen v. Elwall, 4 M. & S. 295 (Eng.).

plaintiff has demanded the property from the defendant and that the latter has refused to deliver it up; in other words, whether evidence of a demand and refusal is requisite to the plaintiff's case.

It has already been observed that conversion consists in a wrongful exercise of dominion over the personal property of another, and it is quite immaterial by what evidence such acts of dominion are established; once it is proved, by whatever legal evidence, there is a liability on the part of the defendant to respond in damages,—that is to say, it is not necessary to prove a demand and refusal, if conversion can otherwise be shown.[67]

The evidence of demand for the goods and an absolute refusal to deliver them is, however, evidence of dominion over the goods by the defendant, and if the demand for them by the plaintiff is based upon a right to the immediate possession of the goods, a wrongful refusal by the defendant to deliver them up establishes a conversion irrespective of any other facts.

The true significance, then, of proof of a demand and refusal is that it is evidence, but only evidence of conversion; if the conversion can be proved by other evidence, as by a wrongful taking,[68] or by a sale of the goods by the defendant, or by evidence of a destruction[69] of them by him, the plaintiff may

[67] Crampton v. Valido Marble Co., 60 Vt. 291, 15 Atl. 153, LEADING ILLUSTRATIVE CASES. Dixie v. Harrison, 50 So. 284 (Ala.); Howitt v. Estelle, 92 Ill. 218.

[68] Dixie v. Harrison, 50 So. 284 (Ala.); Crampton v. Valido Marble Co., 60 Vt. 291, LEADING ILLUSTRATIVE CASES.

[69] Gilmore v. Newton, 9 Allen 171 (Mass.); McPheters v. Page, 83 Me. 234, 22 Atl. 101.

maintain trover although he has not demanded the goods from the defendant before suit. For example: The defendant purchases and takes possession of goods from A, and subsequently re-sells them, supposing A to be the owner. In fact, the goods belong to B, who sues the defendant in trover without previously demanding that the goods be delivered up. B may maintain his action.[70] Some of the Courts have held, however, that if, in the case supposed, the defendant, after receiving the goods, had exercised no distinct act of ownership (as, for example, by re-sale) there must be a demand and refusal, if the defendant bought innocently.[71] The weight of authority is to the effect that a mere assumption of ownership by the defendant is a conversion.[72]

Rightful taking. Where the taking is rightful, as by a bailment, generally speaking the plaintiff must prove a demand and a refusal to deliver, for the reason that, if nothing else appears, the defendant's acts are consistent with recognition of the plaintiff's rights; though even in cases of rightful taking, if the defendant, after notice of the plaintiff's rights and regardless of them, exercises acts of dominion inconsistent therewith, he is liable in conversion without any demand and refusal. For example: A

[70] Pease v. Smith, 61 N. Y. 477; Crampton v. Valido Marble Co., 60 Vt. 291, LEADING ILLUSTRATIVE CASES; Gilmore v. Newton, 9 Allen 171 (Mass.); Galvin v. Bacon, 11 Me. 28; Trudo v. Anderson, 10 Mich. 357; Bane v. Detrick, 52 Ill. 19; Surles v. Sweeney, 11 Oreg. 21.

[71] Pease v. Smith, 61 N. Y. 477; Parker v. Middlebrook, 24 Conn. 207; Burkhalter v. Mitchell, 27 S. Ca. 240. Compare Ely v. Ehle, 3 N. Y. 506.

[72] Cases cited in note 70, and Scott v. Hodges, 62 Ala. 337; Sims v. James, 62 Ga. 260; Rosum v. Hodges, 1 S. Dak. 308, in which the authorities are collected. Rogers v. Dutton, 182 Mass. 187.

delivers goods to B, a carrier, for transportation, and B fails to deliver them. This is not sufficient evidence of conversion,[73] though should A demand the goods of B and the latter without excuse refuse to deliver them, a conversion is established.[74]

But if, in the case supposed, B should sell the goods or should destroy them, or use them, a conversion would be made out, without any demand.[75] So if the carrier delivers the goods to the wrong person, this constitutes an act of conversion and renders the carrier liable without proof of demand.[76]

16. **Same subject—Qualified refusal.**—Demand and refusal are only prima facie evidence of conversion,[77] and it is open to the defendant to explain that the refusal was justifiable.

It is well settled, for example, that if the refusal was due to inability to deliver, because the defendant did not have possession at the time of the demand[78] or because the goods had been destroyed without fault of the defendant;[79] or if it be shown

[73] Crampton v. Valido Marble Co., 60 Vt. 291, LEADING ILLUSTRATIVE CASES.

[74] Atch., Topeka & Santa Fe R. R. v. Jordan Co., 67 Kan. 86, 72 Pac. 533.

[75] Castle v. Corn Exchange Bank, 75 Hun 89 (N. Y.), opinion of Mr. Justice O'Brien; Atch., Topeka & Santa Fe R. R. v. Jordan Co., 67 Kan. 86, 72 Pac. 533; Dench v. Walker, 14 Mass. 500 (adulteration of four hogsheads of rum by defendant, a carrier); Fouldes v. Willoughby, 8 M. & W. 540 (Eng.), LEADING ILLUSTRATIVE CASES.

[76] Edmunds v. Merchants Despatch Co., 135 Mass. 283, LEADING ILLUSTRATIVE CASES; Hanna v. Flint, 14 Cal. 73; Indianapolis, etc., R. Co. v. Herndon, 81 Ill. 143; Devereux v. Barclay, 2 B. & Ald. 702 (Eng.). Compare Crouch v. Great Northern Co., 11 Exch. 742, 757 (Eng.), Martin, B.

[77] Singer Mfg. Co. v. King, 14 R. I. 511; Cooley, Torts (Students' ed.), pp. 431-432.

[78] Frome v. Dennis, 45 N. J. L. 515.

[79] Salt Springs Nat. Bank v. Wheeler, 48 N. Y. 492; Cooley, Torts (Students' ed.), pp. 431-432, and examples.

that the defendant was merely acting as agent of another, and desired opportunity to consult his principal;[80] or that the refusal was conditional or qualified, e.g., until the plaintiff should establish his right,[81] refusal under such circumstances to comply with the demand is not sufficient evidence of a conversion.

So the refusal to deliver to the plaintiff goods which are at the time in the possession of a third person over whom the defendant has no more control than the plaintiff has, is not sufficient evidence of conversion.[82] Nor is it sufficient if a carrier refuses to deliver where the goods have been attached by a third person under lawful process.[83]

Same underlying principle. The whole question of the necessity of proof of demand and refusal is well summed up by Mr. Justice O'Brien in Castle v. Corn Exchange Bank.[84] "The principle underlying these different instances of when conversion will lie is the same in all, requiring that before an action for conversion can be maintained the person sought to be held shall, either by his own act or the act of the owner of the property, be placed in the wrong." In this case the defendant was rightfully in possession of a draft for collection; it was

[80] Burroughes v. Bayne, 5 H. & N. 296 (Eng.), LEADING ILLUSTRATIVE CASES; Alexander v. Southey, 5 B. & Ald. 247 (Eng.); Vaughan v. Watt, 6 M. & W. 492 (Eng.); Sutton v. Great Northern R. R., 99 Minn. 376, 109 N. W. 815; Merz v. Chic. & N. W. R. R., 86 Minn. 33, 90 N. W. 7; Sargent v. Gile, 8 N. H. 325, LEADING ILLUSTRATIVE CASES.

[81] Singer Mfg. Co. v. King, 14 R. I. 511.

[82] Dozier v. Pillot, 79 Tex. 224, 14 S. W. 1027.

[83] Hett v. B. & M. R. R., 69 N. H. 139, 44 Atl. 910.

[84] 75 Hun 89 (N. Y.).

found that the defendant had exercised no act of dominion over the draft, inconsistent with the owner's rights, and that there had been no demand for it by the owner or by anyone having authority from him. It was accordingly held that the defendant was not liable in an action of trover for the conversion of the draft.

17. **Vesting of title of property converted.**—Inasmuch as the plaintiff in trover sues for and, generally speaking, recovers judgment for the value of the property,[85] at some point of time, between the act of conversion and final satisfaction of the judgment by the defendant, title to the goods ought to vest in the defendant; the plaintiff ought not to be allowed the value of the goods and still be able to reclaim the goods themselves. At common law the question was one of election, the plaintiff having the right to replevy the goods or to waive the wrong and sue for the value, and if he chose the latter course and pursued the suit to a judgment, his election to treat the goods as the defendant's and to recover the value of them was made.[86]

[85] For the general rule of damages in trover, see Greenfield Bank v. Leavitt, 17 Pick. 1 (Mass.); Spooner v. Manchester, 133 Mass. 270; Crampton v. Valido Marble Co., 60 Vt. 291, LEADING ILLUSTRATIVE CASES; Cooper v. Chitty, 1 Burr. 20 (Eng.); Austin v. Vanderbilt, 48 Oreg. 206, 85 Pac. 519. Where defendant has a special property in, or lien on the goods, see Donald v. Suckling, L. R. 1 Q. B. 585 (Eng.), opinion of Shee, J.; Spencer v. Vance, 57 Mo. 427. Cooley, Torts (Students' ed.), pp. 435, 436, and cases. As to effect of a return, or offer to return the goods, see Miller v. Hyde, 161 Mass. 472, 37 N. E. 760, LEADING ILLUSTRATIVE CASES; Cooley, Torts (Students' ed.), § 239, and cases cited. Burdick, Torts, pp. 363, 364, and cases cited.

[86] See dissenting opinion of Mr. Justice Holmes in Miller v. Hyde, 161 Mass. 472, 37 N. E. 760, LEADING ILLUSTRATIVE CASES, and authorities therein cited.

The modern rule, however, generally is that title does not vest in the defendant in trover until there has been a satisfaction of the judgment, that is, until the plaintiff has been paid. In the leading case of Miller v. Hyde,[87] the Supreme Court of Massachusetts held—three judges dissenting—that the plaintiff could replevy the horse, notwithstanding that she had previously obtained a judgment for the value of it in an action of trover in which the horse had been attached on mesne process, and after judgment, execution had issued in her favor, on which the officer had advertised the horse for sale; on the ground that it was not just that the plaintiff should be deprived of her property until satisfaction to the value of it had been obtained. This is the general rule, and is right enough, provided, of course, the defendant is protected from further liability on the outstanding judgment.[88]

[87] 161 Mass. 472, 37 N. E. 760, LEADING ILLUSTRATIVE CASES.

[88] See opinion of Mr. Justice Holmes in Miller v. Hyde, 161 Mass. 472, 37 N. E. 760, LEADING ILLUSTRATIVE CASES; Cooley, Torts (Students' ed.), p. 437, citing authorities.

CHAPTER III.

PARTICULAR INSTANCES OF CONVERSION.

18. **Conversion by bailee — Conditional sales.** — Any unauthorized act of dominion by a bailee of property inconsistent with the rights of the bailor is a conversion, and, in determining whether the act is inconsistent with the bailor's rights, the terms of the agreement under which the bailment was created must be consulted. If a bailee of a horse, hired for a particular journey, intentionally departs from that journey, his act is a conversion of the horse;[89] so a misdelivery by a carrier is a conversion;[90] so, too, if a bailee sells the property, having no right so to sell under the terms of the bailment.[91]

Conditional sales. Not infrequently personal property is delivered by one person to another under the terms of a contract whereby the latter is to acquire the title to the property upon performance of certain conditions precedent, such, e. g., as the giving of his note for the purchase price[92] or payment of the price in a designated manner.[93] Such a transaction is a so-called conditional sale, and in

[89] Perham v. Coney, 117 Mass. 102; Wentworth v. McDuffie, 48 N. H. 402.

[90] Edmunds v. Merchants Despatch Co., 135 Mass. 283, LEADING ILLUSTRATIVE CASES.

[91] Carter v. Kingman, 103 Mass. 517; Hirschorn v. Canney, 98 Mass. 149; Cooley, Torts (Students' ed.), pp. 424, 425, and cases cited.

[92] Hirschorn v. Canney, 98 Mass. 149.

[93] Sargent v. Gile, 8 N. H. 325, LEADING ILLUSTRATIVE CASES; Carter v. Kingman, 103 Mass. 517.

reality amounts to a bailment with the right in the bailee to become the owner.[94] Difficulty has arisen in such cases over the question whether a sale by the so-called conditional vendee, before fully complying with the condition, is a conversion. It is clear enough that if there is a special provision in the contract against such a sale or against removal of the goods, the sale is of itself a conversion, and renders the conditional vendee,[95] or his vendee,[96] liable in trover.

In Hirschorn v. Canney, the contract was that Hirschorn's vendee should send his note for the goods; he failed to do this, but sold to Canney,[97] who purchased in good faith. It was held that Canney was liable in conversion.[98] The test in such cases seems to be whether, at the time of sale by the conditional vendee, he was in default under the provisions of the contract; if so, his sale is a conversion, as is also the purchase and assumption of ownership by his vendee.[99] For example: in the cases of Hirschorn v. Canney, supra, and Coggill v. Railroad, the conditional vendee had failed to send his note as provided for in the contract; in Carter v. Kingman, the conditional vendee had violated the express provision of the contract that he should not sell or remove the goods.

There is some difference of opinion in the cases

[94] Coggill v. Hartford, etc., R. R., 3 Gray 545 (Mass.); Sargent v. Gile, 8 N. H. 325, LEADING ILLUSTRATIVE CASES.

[95] Carter v. Kingman, 103 Mass. 517.

[96] Hirschorn v. Canney, 98 Mass. 149.

[97] 98 Mass. 149.

[98] Coggill v. Hartford, etc., R. Co., 3 Gray 545 (Mass.).

[99] Robinson v. Bird, 158 Mass. 357.

whether, if the contract is silent with reference to a re-sale or removal of the goods and provides for payment of the price at a future date or by installments, a re-sale by the conditional vendee before breach of the condition is a conversion. By some authorities, such a sale is a conversion;[1] by others it is not.[2] The authorities holding such a sale to be a conversion proceed upon the ground that by the sale, even before breach of condition, an immediate right of possession vests in the seller;[3] while those which deny that such a sale is a conversion proceed upon the ground that possession and right of possession are vested in the bailee-vendee, and that until violation of the condition, by default, he can transfer his rights without liability in conversion to the bailor-vendor. In Newhall v. Kingsbury,[4] A sold a mowing-machine to B under a contract whereby B was to pay one-half of the price on August 15 and the other half on September 15, and the machine was to be the property of A until paid for. On July 9, C attached the machine as the property of B, and A brought an action of trover against C on July 28. It was held there was no liability. Mr. Justice Morton said that, after delivery, B "had a rightful possession which the plaintiff could not interfere with until a failure by him to perform the condition. He had an interest in the property which he could con-

[1] Sargent v. Gile, 8 N. H. 325, and cases cited, LEADING ILLUSTRATIVE CASES. Johnston v. Whittemore, 27 Mich. 463.

[2] Vincent v. Cornell, 13 Pick. 294 (Mass.); Robinson v. Bird, 158 Mass. 357, and cases cited; Carpenter v. Scott, 13 R. I. 477.

[3] Sargent v. Gile, 8 N. H. 325.

[4] 131 Mass. 445.

vey and which was attachable by his creditors, and which could be ripened into an absolute title by performance of the conditions. * * * At the time the plaintiffs commenced this suit, there had been no breach of condition, and they had no right of possession."[5]

19. **Conversion by pledgee.**—From the nature of a pledge, which is defined as a bailment of goods by a debtor to his creditor, to be kept by him until the debt is discharged,[6] there is an incidental right in the pledgee to entrust the goods to another for safe-keeping, or to convey the goods, subject to the conditions on which he holds them, or to sell the goods, if the debt for which the pledge was given is not paid.[7]

If, however, the pledgee sells the property by an absolute sale or sells it before the debt for which the pledge is given has become due, or re-pledges the goods for a debt of his own of a larger amount than that for which he received the goods, there is, on principle, a conversion, and by some authorities the owner (pledgor) may maintain trover against his pledgee, or the latter's transferee, even without tendering the amount of the debt. For example: If A pledges personal property to B for a debt due from A to B, and B sells the property by absolute sale and in violation of the terms of the pledge, thus

[5] Compare Robinson v. Bird, 158 Mass. 357.

[6] Donald v. Suckling, L. R. 1 Q. B. 585 (Eng.).

[7] Story, Bailments, § 324; Merchants' National Bank v. Thompson, 133 Mass. 482, holding that the rule permitting a sale does not apply to commercial paper, at least before it is due and default made in its payment. Compare Boynton v. Payrow, 67 Me. 587.

putting it beyond his power to return the goods upon the payment of the debt, A may maintain trover without tendering the amount of the debt.[8]

The English Courts, however, have decided that there is no conversion in such cases, at least until the owner has tendered the amount of the debt;[9] if a return of the property is refused upon such a tender, doubtless an action of trover could be maintained.

20. **Innocent purchasers.**—It has already been pointed out that if acts of dominion are exercised by the defendant over the goods of the plaintiff, it is not material that the defendant acted innocently and even with reasonable grounds to believe that he was the owner, or that there were no adverse rights to the goods; in other words, that bad faith was not an essential element of the tort.[10] This is true if the plaintiff is the owner of the goods or otherwise is entitled to possession of them, and if the defendant's acts amount to a conversion.

The fact, however, that the defendant is an innocent purchaser may, and in many cases does, result in a title in him which is good against the plaintiff, though as against the defendant's vendor, the plaintiff was entitled to the goods and to immediate possession of them. For example: A enters into a contract with B to sell to B certain goods, induced by false and fraudulent representations by B, and

[8] Austin v. Vanderbilt, 48 Oreg. 206, 85 Pac. 519; Mullen v. Quinlan & Co., 195 N. Y. 109, 87 N. E. 1078.

[9] Donald v. Suckling, L. R. 1 Q. B. 585 (Eng.). Compare Schaaf v. Fries, 90 Mo. App. 111. Halliday v. Holgate, L. R. 3 Exch. 299 (Eng.).

[10] §§ 13, 14. Hollins v. Fowler, L. R. 7 H. L. 757 (Eng.), Blackburn, J.

the goods are delivered to B. This is a wrongful act of dominion by B over A's goods. A may avoid the sale, replevy the goods, or sue B in trover.[11] Before A takes action against B, however, B sells and delivers the goods to C, who purchases innocently and in ignorance of the fraud practiced by B on A; C is the owner of the goods, and is not liable to A in trover.[12]

Whether, then, the fact of innocent purchase is or is not material turns upon the question whether by such purchase the buyer acquired a better title than his vendor had, that is, whether the defendant acquired a title, good as against the plaintiff; for if he did he is not guilty of conversion of the plaintiff's goods.

21. **Same subject—Purchase from one having defeasible title.**—Where the defendant's vendor had a title, even though his title was defeasible as to the plaintiff, that is, where the plaintiff might defeat that title for any reason, if the defendant purchased innocently and in ignorance of the facts enabling the plaintiff to defeat the title in the defendant's vendor, the defendant thereby acquires a good title.

If, however, the defendant's vendor had no title which he could convey, the defendant's purchase, though innocent, vests him with no title as against

[11] Thurston v. Blanchard, 22 Pick. 18 (Mass.).

[12] Rowley v. Bigelow, 12 Pick. 307 (Mass.); Hoffman v. Noble, 6 Met. 68 (Mass.); Sargent v. Gile, 8 N. H. 325, LEADING ILLUSTRATIVE CASES; Ashton v. Allen, 70 N. J. L. 117, LEADING ILLUSTRATIVE CASES; White v. Garden, 10 C. B. 919 (Eng.). (In this case A was held entitled to maintain trover against C who had retaken the goods from A).

the true owner, and if followed by assumption of possession, is a conversion. For example: In the case of Rowley v. Bigelow,[13] the plaintiff's vendee had obtained title under a fraudulent sale and the plaintiff might have disregarded the sale and replevied the goods or have sued his vendee in trover;[14] but the defendant purchased innocently and thereby acquired a better title than his vendor had, that is, he acquired a title good as against the plaintiff. In Ashton v. Allen[15] an unknown person acquired possession of the plaintiff's goods by fraudulently representing that he was Bowman; he acquired no title, however, of any sort,—none was bargained for or conveyed. The defendant purchased innocently from the unknown, but was held liable to the plaintiff in trover, on the ground that the unknown had no title whatever and hence could convey none.[16] The three cases reported together under the title of Edmunds v. The Merchants Despatch Co.,[17] illustrate the distinction under discussion. In two of the cases, an impostor representing himself to be a brother of Edward Pape, of Dayton, Ohio, purporting to purchase goods from the plaintiffs for Pape, procured the plaintiffs to ship the goods by the defendant company addressed to Edward Pape; in the third case, he represented that he was Edward Pape, and induced the plaintiff to sell him goods by this fraudu-

[13] 12 Pick. 307 (Mass.).

[14] Thurston v. Blanchard, 22 Pick. 18 (Mass.).

[15] 70 N. J. L. 117, LEADING ILLUSTRATIVE CASES.

[16] Compare Cundy v. Lindsay, L. R. 3 App. Cas. 459 (Eng.); Hollins v. Fowler, L. R. 7 H. L. 757 (Eng.).

[17] 135 Mass. 283, LEADING ILLUSTRATIVE CASES.

lent representation, and to ship the goods as in the other two cases. The defendant delivered all the goods to the impostor, and the plaintiffs brought suit in trover for conversion, on the ground of a misdelivery by the defendant carrier. In the first two cases the defendant was held liable, and in the third case it was held not liable, though the defendant was innocent of intentional wrongdoing in all the cases, and had been imposed upon no less than the plaintiffs themselves had been. In the first two cases, however, the impostor acquired no title, nor did any pass to Pape, and consequently the carrier had wrongly delivered the goods.[18] In the third case the title to the goods did pass to the impostor, though the seller could defeat that title because of the fraud; accordingly, the carrier (defendant) had delivered the goods to him who had the title. Hence, it was decided by the court that there was no misdelivery.[19]

22. **Same subject—Conditional vendees.**—The same principle underlies the cases of purchases from conditional vendees. If A purchases from B who has possession of C's goods under a contract calling for the performance of a condition precedent before title shall pass, in violation of which B sells to A, A acquires no title against C, and his purchase, though innocent, followed by assumption of possession, is a

[18] This is the same principle as that upon which Ashton v. Allen, 70 N. J. L. 117, was decided.

[19] That is, the carrier, having exercised what would otherwise be an act of conversion, is protected because the person to whom it delivered *had a title*, and, although the title was a defective one, the carrier is not liable, if the act was done in ignorance of the defect, in like manner as though the carrier had purchased innocently from the impostor.

conversion.[20] If, however, A purchases from B who has purchased from C, under a contract providing that title shall pass to B but shall revest in C upon non-performance by B of a condition *subsequent,* if A's purchase is innocent and in ignorance of B's failure to perform, A is not liable in trover to C; in fact, A's title is good against C.[21] In the former case B had no title at the time of the sale to A; in the latter case, B had title though defeasible, and the sale to an innocent purchaser vested title free of the condition.

23. **Same subject—Attaching creditors.**—Generally speaking, an attaching creditor who attaches goods as those of a fraudulent vendee does not stand in the same position as an innocent purchaser. For example: A by fraud procures a sale of goods from B, and while the goods are in the possession of A they are seized on attachment by C, a creditor of A. C is liable in conversion to B.[22] If, however, C gives credit to A on the strength of A's possession of the goods and in ignorance of the fraud, C's seizure of the goods on attachment is not a conversion as to B.[23]

24. **Transactions in course of business.**—The question how far an innocent defendant, who has dealt with the plaintiff's goods, is protected from liability in conversion by reason of the fact that

[20] § 18 and cases cited.

[21] Holbrook v. Armstrong, 10 Me. 31; Sargent v. Gile, 8 N. H. 325, LEADING ILLUSTRATIVE CASES.

[22] Bussing v. Rice, 2 Cush. 48 (Mass.); Farwell v. Hanchett, 120 Ill. 573; Acker v. Campbell, 23 Wend. 372 (N. Y.); Thompson v. Rose, 16 Conn. 71.

[23] Thompson v. Rose, 16 Conn. 71.

such dealing was according to the ordinary course of business, has given rise to much difficulty and contrariety of opinion. On principle, and excepting possibly dealings with negotiable instruments, it would seem clear that if any exception were to be made to the common law rule of liability for acts of dominion, because done in due course of business, such exception should be made by the legislative branch of the government.[24] If the defendant's act is, in other respects, sufficient to amount to a conversion, the fact that he has acted in the ordinary course of his business proves no more than that he acted in good faith, and this does not excuse him, on principle or authority.[25] The current of authority, moreover, is in accordance with the principle just stated.

In Hollins v. Fowler,[26] the House of Lords held that a broker, who had purchased on behalf of his principal some cotton from one who had no title, and had delivered the cotton to his principal, was liable in trover to the plaintiff, the owner, notwithstanding that the defendant had acted in accordance with the ordinary course of his business. Brett, J., however, dissented and strongly urged that the defendant should not be held liable.[27]

In like manner it is generally held that a sale by

[24] See opinion of Blackburn, J., in Hollins v. Fowler, L. R. 7 H. L. 757 (Eng.).

[25] §§ 13, 14, and cases cited.

[26] L. R. 7 H. L. 757 (Eng.). Compare Consolidated Company v. Curtis and Son, 1892, 1 Q. B. 495 (Eng.); Williams v. Merle, 11 Wend. 80 (N. Y.).

[27] Consolidated Company v. Curtis and Son, 1892, 1 Q. B. 495 (Eng.); Robinson v. Bird, 158 Mass. 357; Swim v. Wilson, 90 Cal. 126; Hudmon v. DuBose, 85 Ala. 446, 5 So. 162; Kimball v. Billings, 55 Me. 147.

an auctioneer of goods belonging to the plaintiff, though the auctioneer receives the goods from one whom he innocently, though erroneously, supposes to be the true owner, and sells in due course of business, is a conversion.

On the other hand, it is held that if a broker merely negotiates a sale, without intermeddling with the goods, there is no conversion;[28] so merely transporting the plaintiff's goods at the request of one wrongfully in possession of them does not render a carrier liable;[29] nor does the mere interference with the possession of the plaintiff's goods by an agent or bailee of one who has converted them;[30] nor is an auctioneer liable who negotiates a sale for one who wrongfully has taken the plaintiff's property, if the auctioneer does not receive or deliver the goods.[31]

In Greenway v. Fisher,[32] it was held that a customs officer who merely shipped the goods, and made affidavit that he was the owner, according to a common practice, was not liable in conversion. All of these cases, however, are consistent with the general principle. In none of them is there any unequivocal act of dominion indicating a claim of ownership, or any necessary repudiation of the rights of the true owner; and the fact that the acts done were done

[28] Lancaster Co. v. Fitzhugh, 6 H. & N. 502 (Eng.); Hollins v. Fowler, L. R. 7 H. L. 757 (Eng.).

[29] Gurley v. Armstead, 148 Mass. 267, LEADING ILLUSTRATIVE CASES.

[30] Loring v. Mulcahy, 3 Allen 575 (Mass.); Leonard v. Tidd, 3 Met. 6 (Mass.).

[31] Compare Consolidated Company v. Curtis & Son, 1892, 1 Q. B. 495 (Eng.); Burbank v. Crooker, 7 Gray 158 (Mass.).

[32] 1 C. & P. 190 (Eng.). Compare Leuthold v. Fairchild, 35 Minn. 99.

in the ordinary course of business, indicates that there was no intent to convert, in fact.

25. **Same subject—Negotiable instruments.**—In Spooner v. Holmes,[33] the Supreme Court of Massachusetts held that a broker who received certain coupons on government bonds, payable to bearer, from one who had stolen them from the plaintiff, was not liable in conversion, though the defendant sold the coupons, received payment therefor, and paid over the proceeds to his principal, who had received them from the thief; on the ground that such instruments, being negotiable, stand on a different footing than do ordinary chattels and that the fact that the defendant acted only as agent and in ordinary course of business negatived a conversion.[34]

In Kimball v. Billings,[35] upon similar facts to those in Spooner v. Holmes, the Supreme Court of Maine held that the defendant was liable in conversion to the true owner. On principle the decision in Kimball v. Billings seems to be right. As stated by the Court in that case:[36] "It is no defense to an action of trover that the defendant acted as the agent of another. If the principal is a wrongdoer his agent is a wrongdoer also."

It is perfectly clear that "a person is guilty of conversion who sells the property of another without authority from the owner, notwithstanding he acts under the authority of one claiming to be an owner and is ignorant of such person's want of authority." It

[33] 102 Mass. 503.
[34] See, however, Kimball v. Billings, 55 Me. 147.
[35] 55 Me. 147.
[36] Kimball v. Billings, 55 Me. 147.

is also true that the mercantile law as to negotiability enables a purchaser to acquire a title to a negotiable instrument, although under the same circumstances the purchaser of an ordinary chattel would not acquire title by the rules of the common law,[37] that is, there may be no conversion of a negotiable instrument because title was acquired, and under the same circumstances there may be a conversion of an ordinary chattel because no title was acquired. If, however, no title to the negotiable instrument is acquired by the purchase, according to the law of trover, any unauthorized dominion over the instrument exercised against the rights of the true owner is a conversion of it and should render the person so exercising ownership liable for the value of it to the true owner.[38]

The truth is that one who exercises acts of dominion or ownership over chattels does so at his peril, and it is at least questionable whether the hardship of this rule is any greater in cases of dealings with negotiable instruments than it is with respect to dealings with other articles of property.[39]

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[37] For example, innocent purchase from a thief of instrument payable to bearer. See Revised Laws of Mass., chap. 73, § 33, and provisions in other states adopting the Negotiable Instruments Law.

[38] See § 10. See also §§ 13 and 14.

[39] See opinion of Brett, J., in Hollins v. Fowler, L. R. 7 H. L. 757.

LAW OF TORTS

PART III

LEGAL CAUSE AND NEGLIGENCE

BY

BARRY GILBERT, A.B., LL.B.*

CHAPTER I.

LEGAL CAUSE.

1. **Causation.**—When we try to ascertain what was the cause of any given event, we must look at all the antecedent happenings which combined to produce that event. When we look to see what in turn was the cause of each of these antecedent happenings, the inquiry becomes a very broad one. The farther back we try to trace the influences that in turn produced each set of causes, the greater and greater become the number of things which have contributed in some degree to the occurrence of the event in question.

In a certain sense, every factor in the chain of circumstances leading up to a given event is a cause of that event, but the most of such causes have only

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a remote bearing on the final result. If we reverse the process and start with an act, and seek to trace to an end all the results of that act, we likewise find that shortly so many other factors join with it that it soon becomes only one of a vast number of causes, and that other influences play a larger part than it in producing some results in which it has a part.

Thus, while the logician may say that the cause of an event is "the sum of all its antecedents,"[1] or that "an act is the cause of all events to which its influence can be traced," the law, in fixing responsibility, must adopt some more limited and more definite standard. It must recognize somewhat the relative influence of those causes which contribute to a given result. Otherwise, there would be no end of the consequences for which a wrong-doer would be liable.

2. **Legal cause.**—The law, therefore, holds a wrong-doer liable only for those results wherein his act was the "legal cause"; that is, a predominant cause according to certain rather indefinite tests which have been worked out. It is often said that he is not liable for "remote consequences." How can we determine what consequences are not remote? Several rules have been suggested from time to time.

3. **"But for" rule.**—In Gilman v. Noyes,[2] the plaintiff's sheep were eaten by bears. The lower court instructed the jury that "if the plaintiff's sheep escaped in consequence of the bars being left down by the defendant, and would not have been killed *but for* the act of the defendant," he was liable. Of

[1] John Stuart Mill, Logic, chap. 5.

[2] 57 N. H. 627, LEADING ILLUSTRATIVE CASES.

course, if it had appeared that the defendant's act had had nothing whatever to do with the loss of the sheep, he would not have been liable,[3] but it was not enough to show that it had had some connection with and was a necessary factor in the loss of the sheep, for the same thing was true of the myriad of other things that contributed to produce the result. The upper court, therefore, reversed the case. The "but for" rule fails to discriminate as to the importance of the various factors coöperating as causes, and is therefore generally discarded as unsound.

4. **Last human wrong-doer rule.**—In Clifford v. Atlantic Cotton Mills[4] Mr. Justice Holmes said "the general tendency has been to look no further back than the last wrong-doer." This may in general be a true statement as a mere rule of thumb, but it can hardly be used as a discriminating test to decide liability, for sometimes the act of the last human wrong-doer is so remote as entirely to have spent its force[5] and at other times a wrong-doer prior to the last in chronological order may be held liable along with the last, if he should have anticipated the subsequent wrongful act,[6] or if his act was a concurring cause.

5. **Probable consequence rule.**—The rule most frequently suggested is thus stated: "The wrong-doer is liable for all the natural and probable consequences of his act." The word "natural" apparently means "without unusual departure from the ordinary course of nature." The courts do not

[3] Ring v. Cohoes, 77 N. Y. 83.
[4] 146 Mass. 47, 15 N. E. 84.
[5] Compare § 17.
[6] Compare § 25.

seem to wholly agree on the meaning of the word "probable." Some seem to view it as meaning that the result must have been so far foreseeable that the chances were in favor of its happening,[7] while others apparently require only that the result was one not unlikely to occur.[8]

So, when the defendant has started a negligent fire he is liable for all the destruction which he ought to have foreseen at that time in the light of the attending circumstances, which include the strength and direction of the wind, the combustible character of the surrounding structures and their distance from the fire.[9] So, one must be deemed to have anticipated that animals and human beings will act on a given occasion as such animals and persons normally act under such circumstances.[10]

This rule is often called the "foresight" rule, because it takes as a standard what a reasonable man standing in the position of the defendant at the time he committed the tort might or ought to have foreseen.[11]

6. **Implied negative rule.**—The foregoing affirmative rule that whenever a man so situated did foresee or ought to have foreseen the result, he is liable for it, implies as a corollary the negative proposition

[7] Wood v. Pennsylvania Ry., 177 Pa. 306, 35 Atl. 699.

[8] 1 Shearman & Redfield, Negligence (5th ed.), § 28.

[9] M. & St. P. Ry. Co. v. Kellogg, 94 U. S. 469, LEADING ILLUSTRATIVE CASES. In New York, a peculiar and arbitrary rule exists for liability for fire. The negligent wrong-doer is there held liable only for the destruction of the first building to which the fire spreads. Ryan v. N. Y. C. R. R., 35 N. Y. 210.

[10] See §§ 18 and 19.

[11] The test tends to confuse negligence and causation. See Christianson v. Railway, 67 Minn. 94, 69 N. W. 640.

that "the wrong-doer is not liable for those results which were not reasonably foreseeable by him."

Thus, in Marvin v. C. M. & St. P. Ry. Co.[12] it appeared that after the defendant had negligently started a fire, a violent whirlwind suddenly arose and carried it to a distance far beyond what could have been foreseen when the fire was started. The defendant was not held liable for the distant structures thus burned.

But, while the affirmative proposition is followed with general uniformity,[13] the negative proposition, while generally true, has a number of exceptions, and indeed is often discarded for the "proximate cause" rule.[14]

7. **First exception.**—If the defendant could have foreseen that harm of some kind would follow his act, it is not necessary to show that he could have foreseen the harmful result in the precise form in which it occurred.[15]

This principle is applied particularly in personal injury cases. Thus, in Vosburg v. Putney,[16] it appeared that the defendant, a school boy, playfully kicked his seatmate on the shin. The touch was slight, but owing to the fact that disease germs were present in the boy's leg, serious consequences followed and the leg had to be amputated. The defendant was held liable for all the consequences. The plaintiff in Mann Boudoir Car Co. v. Dupre[17] was

[12] 79 Wis. 140, 47 N. W. 1123.

[13] The most material variation from it is discussed in §§ 27 to 30.

[14] See §§ 11 to 13.

[15] A leading case is Hill v. Winsor, 118 Mass. 251.

[16] 78 Wis. 84, 47 N. W. 99; 80 Wis. 523, 50 N. W. 403.

[17] 54 Fed. 656.

pregnant, but her condition was not known to the employees of the company, who so carelessly assisted her off the train that she fell and suffered a miscarriage. The defendant was held liable for this form of injury.

Nor need the defendant have been able to foresee just what individual would be injured by his wrong. Thus, one who negligently allowed his horse to run away would be liable to one whom the horse struck whether he knew the person was at hand or not.[18] In Burk v. Creamery Package Mfg. Co.,[19] the defendant delivered to one Riedel a jug which was supposed to contain buttermilk, but which instead contained sulphuric acid. Burk asked Riedel for a drink of buttermilk, drank from the jug, and died from the poison. The defendant was held liable for the death.

8. **Second exception.**—When the defendant has acted criminally, particularly if the crime was one of some magnitude, or if his act, though not criminal, was consciously wrongful, the disposition of the courts is not to inquire so carefully as usual as to whether the harmful result was foreseeable or not. The proper explanation of this attitude seems to be that public policy requires here a stricter rule and the law therefore withdraws a limitation on liability which it affords when the defendant's act is merely negligent or without wrongful intent. Then, too, the wilful wrong-doer more frequently actually contemplates or is in a position where he ought to contem-

[18] Griggs v. Fleckenstein, 14 Minn. 81.
[19] 126 Iowa 730, 102 N. W. 793.

plate the results of his acts, even those relatively remote; but it would be a difficult matter to prove his exact state of mind if proof had to be furnished.[20]

Thus, in Wyant v. Crouse,[21] the defendant was held liable for the spread of a fire in a blacksmith's shop, which he lighted and cared for carefully enough, but which he started to keep himself warm after breaking into the shop. The same principle will also serve to explain some cases falling under the first exception.

9. **Third exception.**—Likewise, when one's act is in violation of a statute, he is often held liable for results which were not foreseeable. In Salisbury v. Herchenroder,[22] an ordinance prohibited the hanging of signs across a public street. The defendant hung his sign in violation of the ordinance. It was blown down by a gale so unusual as not to be foreseeable, and in falling, it jerked a bolt across the street through the plaintiff's window. This being the kind of a harm that the ordinance was passed to prevent, consequently the defendant was held liable. But for the violation of the ordinance, the fact that the gale was extraordinary would have relieved him from liability.

Statutes occasionally state that one who violates them shall be responsible for "all damages" which shall ensue. The meaning of any given statute is a matter of construction, but the courts in such cases

[20] See also §§ 27 to 30. Any doubts might well be resolved in favor of the unintentional wrong-doer and against the wilful wrong-doer.

[21] 127 Mich. 158, 86 N. W. 527.

[22] 106 Mass. 458.

usually dispense with the requirement that the damage must have been foreseeable, and allow it to be recovered so long as the violation of the statute had a material part in the harmful result.[23]

Thus, in Eten v. Luyster[24] the defendants pulled down a stable under summary process, but wrongfully. The statute required such a wrong-doer to pay all damages occasioned by his act. The plaintiff had placed $2,000 in cash in the feed box and this was lost. The defendants were held liable for it, although they had no intimation that the money was in the stable.

10. **Fourth exception.**—When the results were not such that they would ordinarily be reasonably foreseeable, yet if the defendant in the particular case did actually foresee them and desired them to happen, he is liable for them.[25] A man certainly should not escape responsibility for an evil which he foresaw, which he sought to produce and did produce, on the ground that a reasonable person would not have been as far-sighted as he actually was. There are few actual decisions upon this point, but there are a number of dicta, and legal authors assert the proposition with confidence.[26]

11. **Difficulty of stating rules.**—While the foregoing rules and exceptions are often applied by the courts, one who is familiar with the cases soon realizes that the multitude of odd or possible situations

[23] See Davis v. Standish, 26 Hun 608 (N. Y.).

[24] 60 N. Y. 252.

[25] Perhaps this should not be stated as an exception to the negative rule of § 6, but rather as a specific application of the affirmative rule of § 5.

[26] See §§ 27 to 30 for fuller discussion.

that arise precludes any great degree of positiveness in laying down definite rules of legal cause. Each case turns so largely on its own peculiar facts that the authorities are useful not so much to solve the general theory of legal cause, as to furnish illustrations of what in particular situations is and what is not too remote a harm for recovery.[27]

The fundamental difficulty is that the subject is too complex to admit of a simple solution by a few rules, but different problems require different methods of approach. A further difficulty is that the courts have not been perfectly clear in seeing this or frank in saying so. We often find a court which adopts the "probable consequence" rule, saying in another decision that the defendant is liable for all the "natural and proximate consequences" of his act, apparently without recognizing that the two tests stated approach the problem from exactly opposite points of view, and mean widely different things.

12. **Same subject.**—If the result is both proximate and foreseeable, or neither proximate nor foreseeable, the outcome will be the same under each rule. But when a result is (1) proximate though not foreseeable, or (2) foreseeable but not proximate, the two rules conflict and the question is, which shall be applied? In the first situation, the courts usually first apply the probable consequence rule, but when the result reached is deemed unsatisfactory, reject it unless it is confirmed by the natural and proximate rule. Whether the result be deemed satisfactory or

[27] Dubuque Wood and Coal Ass'n v. Dubuque, 30 Iowa 176, LEADING ILLUSTRATIVE CASES.

not depends much on individual opinion and judgment, and on an intuitive legal sense. It must be admitted that there is much conflict in the authorities. While the foregoing will not reconcile the decisions, yet it serves to explain them. In the second situation the courts should apply the probable consequence rule, but the decisions are not harmonious.[28]

13. **Natural and proximate rule.**—This rule may be roughly termed the "hind-sight" rule. Instead of putting itself in the position of the wrong-doer at the time he did the wrongful act and inquiring whether he then might have foreseen the harmful result, the court puts itself in the position of the one who is harmed, viewing the injury after it has occurred, and asks whether it now appears that the result flowed from the defendant's act naturally and proximately, with no intervening factor to break the chain of causation. In other words, instead of looking at the matter prospectively, the court looks at it retrospectively.

In general, the word "natural" means "without unusual departure from the ordinary course of nature." To say that the defendant's act is the proximate cause means that in some way the influence of his act predominates over other influences, or at least is of equal importance in producing the result.

14. **Direct results.**—If the defendant's act set in motion a physical force which, before it comes to rest, produces a harmful result without any other inter-

[28] See §§ 27 to 30.

vening acts or forces whatever, then the defendant's act is the direct and exclusive cause of the harm and the result is proximate. If it be a result which is not an extraordinary departure from the ordinary, it cannot be denied that there is nowhere any doubt of his liability.[29]

Unless one admits the possibility of miracles happening, it is difficult to say that nature has ever operated in an unnatural way. However, the operation of certain elemental forces cannot be predicted with accuracy. When these supervene in an unexpected way, we can say this is unnatural or abnormal. Such, for example, would be sudden storms and unusual cold or floods. This is really all that should be considered as a not-natural act of nature, but some courts seem to think that odd and unusual accidents are somehow not natural, as though nature were temporarily off duty.

Thus, in Wood v. Pennsylvania R. R. Co.,[30] it appeared that the defendant's locomotive, negligently running sixty miles an hour as it neared a station, struck a woman who was crossing the track. The impact threw her body through the air a considerable distance. In falling, the body struck the plaintiff and injured him. The court somewhat confused the question of plaintiff's absence of contributory negligence with the question of proximate cause, and said that the accident was so unusual as not to be foreseeable,

[29] It will be observed that the same result is reached by the application of the probable consequence rule. See § 5.

[30] 177 Pa. 306, 35 Atl. 699. And compare an unsound result on a similar ground in Hoag & Alger v. Lake Shore & M. S. R. R. Co., 85 Pa. St. 293. Kuhn v. Jewett, 32 N. J. Eq. 647, on exactly the same facts as the Hoag case, is contrary to it.

and that the defendant was not liable. If the railroad owed the plaintiff any duty of care, it would seem impossible to say that this result was anything else than direct and therefore proximate. Nature of course here operated in the only way that it could act. The result was not a miracle. There was no intervening circumstance between the impact and the injury. The court seems to have laid stress on the peculiarity of the accident. On the other hand, it is often said that the fact that a result is peculiar is no ground for excusing a defendant.[31] This latter view seems preferable in the case of all harms directly produced.

15. **Intervening causes—Consequential results.**—When the defendant's act does not immediately produce the harmful result, but when there are other factors coöperating with it, the question whether or not the defendant's act was the proximate cause is answered largely by examining the nature and character of these coöperating factors and seeing whether in any just sense they intervened between the defendant's act and the result. If they did, they, rather than the defendant's act, caused the result. If they did not, then the defendant's act is in law at least equally the cause, and he cannot escape liability.[32] Those factors which are most frequently set up as intervening causes may be roughly classified in groups.

[31] Doyle v. C. St. P. & K. C. Ry., 77 Iowa 607, 42 N. W. 555, is a case in point. This was a damage suit where plaintiff was struck on the head by a flying coupling pin.

[32] Many of these cases could have been decided the same way under the probable consequence rule. When they could not, we must remember the explanation given in §§ 11 and 12.

16. **Intervening acts of nature.**—It is uniformly held that causal connection is not broken by the intervention of the ordinary forces of nature unless they were so unusual as to be unnatural (in the sense used in § 14). Thus, in Romney Marsh v. Trinity House,[33] the defendants negligently ran their vessel ashore about a mile out from the plaintiff's sea-wall. It was then blowing hard and there was a flood tide. The vessel was washed in and it damaged the wall. The wind and the tide were held not to be an intervening cause and the defendants were held liable for the harm to the wall.

So, in Kuhn v. Jewett,[34] a train of oil cars collided with a locomotive and was derailed. Some of the cars burst and the oil ran out upon the surface of a small stream, where it was ignited by coals from the engine. The burning oil was carried down the stream some distance, and there ignited the plaintiff's building. Though scarcely foreseeable, the result was held proximate, as there was no intervening cause.

17. **Same subject—Carrier cases.**—Ordinarily, however, the intervention of nature in an unexpected way is deemed an intervening cause and relieves the defendant from liability. In Morrison v. Davis,[35] the defendant was transporting merchandise by canal boat, but had a lame horse. Owing to this fact, the boat was overtaken by an unusual flood and the goods were destroyed. Had the defendant taken due care, the goods would have been out of the way of danger.

[33] L. R., 5 Exchequer 204 (Eng.).
[34] 32 N. J. Eq. 647.
[35] 20 Pa. St. 171.

In McClary v. Railroad,[36] a train that was negligently behind time was caught by a windstorm, and the plaintiff was injured. Had it been on time, or still more behind time, it would not have been struck. In Denny v. New York Central R. R. Co.,[37] owing to negligent delay, goods were overtaken in transit by an unprecedented flood. It was held in all these cases that the forces of nature, being unexpected, amounted to an intervening cause, and the defendants were held not liable. The defendants' negligence was thus rather a condition than a cause.

There are a number of cases, however,[38] like the foregoing, wherein, the defendant being a common carrier of goods, the court has held it liable, notwithstanding the unprecedented character of the natural force, on the ground that the defendant by its delay consciously exposed the goods to a continued peril. This may involve for its proper explanation some rules peculiar to the law of carriers.[39]

18. **Intervening acts of animals.**—Likewise, causal connection is not broken by the intervening acts of animals when the animal acts in the way that such animals ordinarily act. In West v. Ward,[40] the defendant left down the bars to plaintiff's field. A mare escaped and ran into a barbed wire fence. In McDonald v. Snelling,[41] the defendant's horse

[36] 3 Nebr. 44.

[37] 13 Gray 481 (Mass.), LEADING ILLUSTRATIVE CASES; accord, Rodgers v. Mo. Pac. Ry., 75 Kas. 222. (Same flood as in Iowa case.)

[38] Green-Wheeler Shoe Co. v. C. R. I. & P. Ry., 130 Iowa 123, 106 N. W. 498. Michaels v. N. Y. Cent. R. R. Co., 30 N. Y. 564. (Same flood as in Denny case.)

[39] See subject, CARRIERS.

[40] 77 Iowa 323, 42 N. W. 309.

[41] 14 Allen 290 (Mass.).

through negligence ran away. It ran into Baker's sled and frightened Baker's horse, which ran away and struck the plaintiff's sleigh. In both cases the defendant was held liable for the consequential injuries. In Gilman v. Noyes,[42] the act of the bears in eating the sheep would not be an intervening cause unless the jury believed that there was no reason to apprehend the presence of bears in the vicinity.

19. **Intervening instinctive acts.**—When the plaintiff has been put in a position of peril by the defendant's misconduct, and instinctively does an act to protect himself from injury, but which unfortunately results in harm to himself, this act is not deemed an intervening cause. Thus, in Woolley v. Scovell,[43] the defendant threw a bag of wool out of the upper windows of his warehouse, at the same time calling out a warning. The plaintiff started to run, but ran in the direction of the falling bag and was struck. The court told the jury that if the plaintiff had lost his presence of mind by the act of the defendant and in the confusion produced by the situation had run into the danger, the plaintiff could recover. The jury found for the plaintiff.

Nor is the instinctive act of a third person an intervening cause. If one should throw a firecracker at another and he to save himself should convulsively and instinctively catch it and hurl it away from himself, he would be no more liable for the harm done to the person whom it struck in exploding than if it merely bounced off from him. The one who threw

[42] § 3.
[43] 3 M. & R. 105 (Eng.).

the firecracker would be liable, as the other's act was not an intervening cause.[44] If the other had time for deliberation and acted deliberately, the result would probably be different. In Vandenburgh v. Truax,[45] the defendant purposely frightened a negro boy, who ran for safety and accidentally knocked a spigot from a barrel of molasses. The defendant was held liable for the loss of the molasses.

20. **Intervening volitional acts of plaintiff—Nonculpable.**—If the plaintiff is in a position of peril through the defendant's act, he may act even with some degree of deliberation without becoming an intervening cause, provided he acts with reasonable circumspection.[46] In Jones v. Boyce,[47] the plaintiff jumped from a stage coach to escape from an impending collision. The court instructed the jury that if he acted rashly and out of an unreasonable apprehension of danger, he could not recover; but otherwise, if he acted as a reasonable and prudent man. The jury found for the plaintiff. In McKenna v. Baessler,[48] the plaintiff set a back-fire to protect his property from a fire previously started by the defendant. It got beyond his control, without negligence, and destroyed his property. It was held that his petition stated a cause of action.

Particularly is this true when it was the plaintiff's duty to avert the peril. Thus, in Knapp v. S. C. & P. Ry.,[49] the plaintiff, an engineer on the defendant

[44] Scott v. Shepherd, 2 Wm. Bl. 892 (Eng.).
[45] 4 Denio 464 (N. Y.).
[46] Brown v. C. M. & St. P. Ry., 54 Wis. 342, 11 N. W. 356, 911.
[47] 1 Starkie 493 (Eng.).
[48] 86 Iowa 197, 53 N. W. 103.
[49] 65 Iowa 91, 21 N. W. 198.

railroad, to avert an impending wreck, with due care reversed his engine. The sudden checking of speed threw such a strain on his arm that it was broken. He was allowed to recover. Likewise, when the life of another is at stake through the defendant's act, the plaintiff, at least when not acting rashly and precipitately, who undertakes to rescue the other, can recover for injuries which he thus sustains.[50] Some courts even apply this doctrine when the plaintiff sustained his injury in saving the property of another from immediate destruction, although he was under no duty to do so.[51]

21. **Same subject—Culpable acts.**—If the plaintiff's act in these cases was not that of a reasonably prudent man, he would be barred by the doctrine of contributory negligence.[52] If the force set in motion by the defendant has come to rest and there is no situation of peril, the voluntary acts of plaintiff thereafter to remedy the situation are not due to the defendant's wrong, but to his own choice, and he cannot recover.[53] His act is an intervening cause.

Such a situation arose in Scheffer v. The Railroad Co.[54] Scheffer was struck on the head on December 7, 1874, became in consequence disordered in mind and a nervous invalid, and killed himself August 8, 1875. The court held as a matter of law that his act of self-destruction was an intervening cause. If this was a sane, conscious act, the result is no doubt cor-

[50] Eckert v. L. I. R. R. Co., 43 N. Y. 502; Gibney v. State, 137 N. Y. 1.
[51] Liming v. I. C. R. R., 81 Iowa 246, 47 N. W. 66. See also § 77.
[52] See Chap. II.
[53] Schoultz v. Eckardt Mfg. Co., 112 La. 568.
[54] 105 U. S. 249.

rect; but if it was an insane, instinctive act, due to a gradual process of physical degeneration occasioned by the blow, the opposite result might well be reached,[55] under the rule in § 7.

22. **Plaintiff's failure to act.**—If the plaintiff has failed to act as a reasonably prudent man under the same circumstances would have acted, the plaintiff cannot recover if his action would have averted the harm. If this failure to act occurs prior to the consummation of the defendant's negligent tort, it is said that the plaintiff is barred by contributory negligence.[56]

If it occurs after the commission of the defendant's either negligent or wilful tort, the plaintiff cannot recover for those damages which he might have prevented by the exercise of due care. This is often called the doctrine of avoidable consequences. Thus, in Loker v. Damon,[57] the plaintiff made no effort to replace his fencing which the defendant had taken down, and cattle subsequently got in and ate the grass. It was held that he could recover only for the cost of replacing the fencing.

23. **Third person's failure to act.**—In the case of Wiley v. W. J. Ry. Co.,[58] sparks from the engine of the defendant company started a fire. The tenant on this plaintiff's property saw the fire, but failed to use due care to extinguish it. It then spread to the plaintiff's farm, a mile distant. It

[55] Malone v. Cayzer, 45 Scottish L. R. 351.

[56] See Chap. III. This doctrine has no application if the defendant's tort was intentional.

[57] 17 Pick. 284 (Mass.). See also subject, DAMAGES.

[58] 44 N. J. L. 247.

was held that the mere failure to act, being that of a third person, could not be regarded as an intervening cause.

24. **Non-culpable acts of third person.**—Although the positive act of a third person was so much a factor in the harmful result that without it the result would not have occurred, yet it may not be an intervening cause, particularly if it was not blameworthy.

Thus, in Griggs v. Fleckenstein,[59] a crowd hallooed and waved at the defendant's runaway horse in an effort to stop him, but only succeeded in turning him at right angles. He ran down a side street and injured the plaintiff, who was allowed to recover from the defendant.[60] The members of the crowd probably were not liable at all. So, too, where a defendant fired on savages that were coming to barter at the plaintiff's vessel and so frightened them away, he was held liable for the loss of profits on their trade.[61]

25. **Negligent acts of third person.**—(a) If the negligent act of a third person came before the defendant's in point of time and has spent itself as an active force, but produces a passive condition of peril, the defendant cannot assert that this was an intervening cause. It is at most only a coöperating cause, and the defendant is liable for the harm produced by the joint action of this with his own act. Thus, in Hill v. N. R. Co.,[62] contractors who had dug

[59] 14 Minn. 81.

[60] This case also illustrates the matter in § 7.

[61] Tarleton v. McGawley, Peake 270 (Eng.).

[62] 9 B. & S. 303 (Eng.).

an excavation left it unfenced and unguarded. The defendant's negligence frightened the horses which the plaintiff was driving. They swerved to one side and fell into the excavation. The defendant was held liable.

(b) If the contractors were sued instead, we would have a case where a defendant's negligence came first and left a passive condition of peril. It might be argued that the negligence of the third person in frightening the horses was an intervening cause, but most courts would hold that the negligence of the contractors was concurring and would hold them liable also. The courts have reached different conclusions on this problem in Carterville v. Cook[63] and in Mahogany v. Ward.[64]

26. **Same subject.**—(c) If the defendant's negligence came first in point of time and left a condition of peril not wholly passive, but "potentially active," we have a somewhat clearer case for holding him also liable. One who places or piles articles in positions of unstable equilibrium, so that if they are struck, the force of gravity will cause them to fall, may be said to have created a condition that is "potentially active."

There is a difference of opinion as to whether or not the negligent keeping of explosives, steam or electric power, or inflammable materials might fall under the same head.[65]

[63] 129 Ill. 152, 22 N. E. 14. (Held liable.)

[64] 16 R. I. 479, 17 Atl. 860. (Held not liable.)

[65] International & G. N. R. Co. v. Johnson, 23 Tex. Civ. App. 160, 55 S. W. 772. But the decisions in Mars v. D. H. C. Co., 54 Hun 625 (N. Y.), and Stone v. B. & A. Ry., 171 Mass. 536, 51 N. E. 1, seem to point toward an opposite conclusion.

In Pastene v. Adams,[66] the defendants had piled timbers so that their ends projected into a gangway. A teamster drove negligently and caught a wheel on the projecting end of a timber. The pile fell on the plaintiff's leg. The defendants were held liable. The courts that hold the defendant in such situations virtually treat his tort as coming into existence at the moment when the timbers are knocked down and thus regard it as concurrent. Of course the teamster would also be liable.

(d) When both the third person and the defendant are at the same moment of time actively negligent and the two acts combine to harm the plaintiff, the act of the third person is not an intervening cause. Thus, one injured in a collision occasioned by the careless driving of two different vehicles can recover from either driver and it is immaterial which one is most in fault.[67]

27. **Intentional acts of third person.** — (a) In Vicars v. Wilcocks,[68] the defendant had said that the plaintiff had cut certain "flocking-cord" of his employer. The plaintiff sued in slander, alleging that he had been discharged in consequence. The court assumed that the action would lie only on proof of special damage, and Lord Ellenborough said that such damage must be "the legal and natural consequence of the words spoken." He said it was not such here, as the act of the employer was itself a

[66] 49 Cal. 87. See also Lane v. Atl. Works, 111 Mass. 136, where the court laid stress on the thought that the danger should have been apprehended.

[67] Matthew v. London S. T. Co., 60 L. T. R. (N. S.) 47 (Eng.). Compare § 70.

[68] 8 East 1 (Eng.), LEADING ILLUSTRATIVE CASES.

wrong. This would mean that the intervening act of a third person done tortiously or in violation of a legal duty to the plaintiff is an intervening cause. As noted in the preceding section, such a rule is not uniformly applied where the intervening act was only negligent, and in Lynch v. Knight,[69] the House of Lords thought it was not true in all situations even though this act was intentional. The rule of Vicars v. Wilcocks has had a wide influence, but the tendency has been to restrict its application even in cases of defamation.[70]

(b) The rule is properly applied when the defendant's act has produced only a passive condition of peril, and the independent purposeful misconduct of a third person could not have been and was not in fact anticipated by the defendant. Thus, in Alexander v. New Castle,[71] the city had dug a pit along by a sidewalk and had not guarded it. The plaintiff, a constable, was taking an offender to jail, who, when they came opposite the excavation, seized the plaintiff, threw him in, and escaped. The city was held not liable.

If the misconduct of the defendant has left a potentially active state of peril, there is more doubt. In Mars v. D. & H. C. Co.,[72] the defendant left on a sidetrack, unguarded, an engine with its fires banked. Marauders maliciously set it in motion and it collided with a train on the main track, on which train

[69] 9 H. L. C. 577 (Eng.).

[70] Odgers on Slander and Libel (1st Am. ed.), *325. But one is ordinarily not liable for the repetition by another of a slander. Hastings v. Stetson, 126 Mass. 329.

[71] 115 Ind. 51, 17 N. E. 200.

[72] 54 Hun 625 (N. Y.).

the plaintiff was a passenger. The court laid stress on the view that the act of the marauders could not have been foreseen and held the defendant not liable.

(c) When the purposeful misconduct of others ought to have been foreseen or was in fact foreseen, the rule of Vicars v. Wilcocks as literally laid down would apply. Whether or not it ought to be applied, is discussed in §§ 29, 30.

28. **Implied negative rule.**—The affirmative rule of § 13 implies a corresponding negative statement, namely, that "a defendant is not liable for those results which are not natural and proximate;" i. e., where, after the defendant's act, there has been some intervening factor to which the harmful result is more directly traceable. This proposition is generally true. Still, to some degree, the exceptions to the negative "natural and probable consequence" rule[73] have an influence here as well.

The chief difficulties are in those situations where the harmful result was not proximate (i. e., where there was what normally amounts to an intervening cause), but where this intervening factor (1) ought, nevertheless, under the circumstances of the case, to have been foreseen by the defendant, or (2) where it was in fact actually foreseen by him and desired.

29. **Same subject—Foreseen consequential results.**—(First.) If the thing that ought to have been here foreseen was the action of anything else than an intentional human wrong-doer, the defendant ought to be liable.[74] Thus, if one negligently sets

[73] §§ 7 to 10.

[74] This would seem to be a clear case for the application of the principle in § 5.

out a fire in the face of an approaching cyclone, he would be responsible for the spread of the fire to a much greater distance than ordinarily. If the thing that ought to have been foreseen, but was not, was the act of an intentional human wrong-doer, it is not quite so clear that the defendant should be liable. In Guille v. Swan,[75] the defendant went up in a balloon and came down in the plaintiff's garden. The crowd, attracted by his peril, rushed in and trampled down the vegetables. The defendant was held liable for the destruction. In International & G. N. R. Co. v. Johnson,[76] the defendant made no provision to guard a switch. Lawless persons, such as were likely to be in the neighborhood, tampered with it and a train was derailed. The company was held liable. This seems an extreme case, as it was not shown that the defendant had any special reason to then anticipate any depredations on its property. It may turn in part on the rules peculiar to the law of carriers.

30. **Same subject—Foreseen wilful acts.**—(Second.) If the intervening factor, even though it be the wilful wrong of a responsible human being, was actually foreseen and hence desired by the defendant, he ought to be held liable. That is, the "probable consequence" rule ought to override the "natural and proximate consequence" rule, and the arbitrary limitation of liability in Vicars v. Wilcocks[77] ought to be discarded. Thus, if one knew that in a temporarily inflamed state of public feel-

[75] 19 Johns. 381 (N. Y.), LEADING ILLUSTRATIVE CASES.
[76] 23 Tex. Civ. App. 160, 55 S. W. 772.
[77] § 27.

ing a charge of crime would lead to acts of violence against the suspected person and he nevertheless made the charge, which he knew to be unfounded, he should be liable for the ensuing violence. Lumley v. Gye,[78] a leading authority in another field of the law, seems to illustrate this principle. The defendant induced a singer to break her contract with the plaintiff, whereby the plaintiff lost profits. The defendant was held liable although the intervening act was itself a breach of duty. Outside of cases of this type, wherein the question has not been discussed as one of proximate cause, the actual decisions are few. That the defendant should be liable, is stated in numerous dicta[79] and is asserted with confidence by eminent legal writers.[80]

31. **Who decides questions of legal cause.**—The American courts have shown some disposition to dispose of difficult questions of legal cause by leaving them to the jury, under general instructions as to what constitutes legal cause, and letting it apply the rules to the facts.[81] This is not the English practice.[82] It is not done even in America when the question is raised on the pleadings[83] nor where the facts are undisputed and the court thinks that reasonable men could not honestly differ in their conclusions.[84]

[78] 2 E. & B. 216 (Eng.).

[79] See Georgia v. Kepford, 45 Iowa 48. (A case of defamation.)

[80] See articles of Prof. Jeremiah Smith in 25 Harvard Law Review, pp. 103, 223 and 303.

[81] Gilman v. Noyes, 57 N. H. 627.

[82] Hobbs v. L. & S. W. Ry. Co., L. R. 10 Q. B. 111, at p. 122 (Eng.).

[83] McDonald v. Snelling, 14 Allen 290 (Mass.).

[84] Watters v. Waterloo, 126 Iowa 199, 101 N. W. 871.

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CHAPTER II.

NEGLIGENCE.

DIVISION I.

Essentials of an Action for Negligence.

32. **Meaning of negligence.**—Negligence is the breach of a legal duty to use due care. If this duty is not performed and one to whom it is owed is harmed thereby, the negligence becomes actionable. The following elements must all be shown, therefore, to enable a plaintiff to recover from a defendant for the latter's negligence:[85] (1) a legal duty to the plaintiff to use due care; (2) a negligent failure to discharge this duty; (3) damage to the plaintiff; (4) damage caused in a legal sense by the defendant's breach of duty. The fourth requirement has already been discussed.[86]

DIVISION II.

The First Essential: The Legal Duty to the Plaintiff to Use Due Care.

33. **Legal duty.**—The law does not undertake to regulate those obligations which are merely moral in their character.[87] It supervises only those duties which are recognized as legal; that is, it has selected

[85] Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028.
[86] See Chap. I, "Legal Cause."
[87] Prof. Bohlen in 56 U. of Penn. Law Review 217, 316.

for regulation out of the whole possible circle of duties that might be conceived of as resting upon an individual, only certain ones. Thus, if a person by contract undertakes a duty, the law regards this as a legal duty. So also one clearly owes a legal duty not to purposely harm another, although in some cases one may offer a good excuse for a violation of this duty, as, for example, harm inflicted in defense of one's life.[88] One, too, ordinarily owes a duty to all other persons, of whose presence he is aware, not to harm them by his acts of omission.[89] There are, however, many situations wherein one owes no duty to take affirmative steps which will prevent a harm coming upon another. A person is not legally responsible, for example, for failure to rescue another from a peril for the existence of which he was in no wise responsible, even though he could have done so without the slightest danger to himself.

34. **Same subject.**—That these facts are still true although the danger to which the other is subjected was occasioned by the defendant's act, if that act was not itself culpable and a breach of legal duty, is asserted in Union Pacific Ry. v. Cappier.[90] The petition alleged that the defendant's engine ran over a boy, but that the train crew, though they sent at once for physicians, failed to try to staunch his wounds as promptly as they could have done, and the boy bled to death. It appeared, however, that the boy was run over through his own fault and through no fault on the

[88] Dole v. Erskine, 35 N. H. 503.
[89] See Heaven v. Pender, L. R. 11 Q. B. Div. 503 (Eng.).
[90] 66 Kan. 639, 72 Pac. 281.

part of the train operatives. The court held that the company owed him no duty to rescue him from a danger created by his own fault, and hence was not responsible for his death.

It is quite another thing, however, when the defendant, though under no obligation to do so, actually undertakes to care for or rescue one in peril or in need. Thus, a nurse or physician who neglects a patient under his care is responsible for the harm occasioned by his neglect.[91] One must use due care in the performance of any duty, legal or moral, which he undertakes. Thus, one who assists a drunken man must not only do so carefully, but must also use due care not to leave him in a position of peril.[92] If he does some act which increases the peril he is all the more responsible.[93]

35. **Duty owed to plaintiff.**—Nor is it enough to show that the defendant owed a legal duty to some one and failed to discharge it, and that the plaintiff was injured thereby. It must further appear that the defendant owed the legal duty to the one who was harmed. Thus, in Smith v. Tripp,[94] a city, in violation of its duty to keep thoroughfares in proper condition for travel, allowed a street to get into such a condition that water flowed from it down upon the plaintiff's property. It was held that as the city owed no duty to the plaintiff to keep water off his property, the fact that it owed a duty to travelers

[91] Regina v. Instan, 17 Cox C. C. 602 (Eng.).

[92] Black v. N. Y., N. H. & H. R. R. Co., 193 Mass. 448, 79 N. E. 797, LEADING ILLUSTRATIVE CASES.

[93] Depue v. Flatau, 100 Minn. 299, 111 N. W. 1.

[94] 13 R. I. 152.

was immaterial. So, in the case of violations of a statute, the plaintiff can only recover if he comes within the number of those to whom the duty created by the statute is owed.[95] Thus, in O'Donnell v. P. & W. Railway,[96] the defendants, though required by a statute to do so, failed to blow a whistle at a railroad crossing. The plaintiff was a tramp who was walking the track, but who was not seen until it was too late to warn him. It was held that the statute was not intended for the protection of trespassers on the track, that the defendant owed him no duty until it saw him, and that the fact that it owed a duty to those who might be crossing its track at a road was entirely immaterial.

So, a duty of one kind may be owed to one individual and a much less stringent one to another, and each can sue for the violation of only the particular kind of a duty that is owed to himself. This is well illustrated by the cases involving the duty of a land occupant with respect to the maintenance of his premises in a safe condition. The law has decided that he owes a totally different kind of duty to the invited person, the licensee, and the trespasser, respectively.[97]

36. **Duty of maker or vendor of chattels.**—There are a few specific situations that require individual discussion. Suppose that the X company manufactures a stepladder which is defective. X sells it to Y, who in turn sells it to Z. Then Z uses the ladder and is injured by reason of the defect, of the exist-

[95] See also § 48.
[96] 6 R. I. 211.
[97] See §§ 39 to 47.

ence of which he was not aware. Can Z recover from X?[98]

(1) If X purposely makes the ladder defective so that some one will be injured, he will be liable to that person injured, whosoever he may be. One always owes a duty to refrain from purposely injuring another.

(2) If X, however, was only negligent in the manufacture or inspection of the article, and sold it without any actual knowledge of the defect, the case is different. The contract of the manufacturer is only with Y, and Z clearly cannot hold X upon that.[99] But although X owes no duty to Z on the contract, does he not owe a duty to Z to refrain from causing him injury by sending out to him a defective chattel when Z cannot reasonably discover the defect? The case just cited has been misunderstood as holding there was no such duty, and the weight of authority is that there is no recovery by Z.[1] The correctness of such a doctrine is vigorously contested by a number of writers,[2] and there are cases which are inconsistent with it.[3]

37. **Same subject—Exceptions.**—Wherever the rule prevails that Z cannot hold X, there is always made an exception as to those chattels which are inherently dangerous to human life. There is hardly to be found a logical difference in the two types of

[98] The same situation is presented and the same rules should apply when X is not a manufacturer also, but is only a vendor of the chattel, or when Z is not a purchaser, but is only a bailee or user of the article.

[99] Winterbottom v. Wright, 10 M. & W. 109 (Eng.).

[1] Heizer v. Kingsland & Douglass Mfg. Co., 110 Mo. 605, 19 S. W. 630.

[2] See 44 Am. Law Reg. (N. S.) 280, 289, 337.

[3] Blood Balm Co. v. Cooper, 83 Ga. 457, 10 S. E. 118.

cases, but the exception has a practical reason for existence. The leading American case is Thomas v. Winchester.[4] Here, the defendant by mistake sold to A, a druggist, for extract of dandelion, tincture of belladonna, a deadly poison. A in turn sold it to F, a druggist, and F sold part of the bottle to the plaintiff, who became very ill therefrom, but who got well. It has been remarked that "the fact that the article is likely to produce damage is a good reason for requiring a greater degree of care." While this is true, it offers no reason for changing the class of persons toward whom lies the duty to take that care. However, the result reached here has been adopted by the courts as the law.[5]

And to the general rule stated in § 35, there may be further limitations. In George v. Skivington,[6] the defendant, a chemist, compounded a hair wash of improper and injurious ingredients and sold it to the plaintiff's husband for use by the plaintiff. She did use it and sustained an injury. The case does not come under the exception of Thomas v. Winchester, as the medicine was only harmful and not dangerous to human life, but the court allowed a recovery on the ground that the chemist knew that the plaintiff was going to use it. In England, one for whose benefit a contract is made, cannot sue upon it unless he be a contracting party. Hence the suit was not there maintainable on contract. There seems no real reason why the fact that the chemist knew

[4] 6 N. Y. 397, LEADING ILLUSTRATIVE CASES.

[5] See also Burk v. Creamery Package Mfg. Co., 126 Iowa 730, 102 N. W. 793.

[6] L. R., 5 Ex. 1 (Eng.).

who the particular person was who was going to use the preparation should change the result in tort, for in every instance the druggist knows that it will be used by some one, but this was here held a sufficient circumstance to create a duty to the plaintiff. It seems that there would not have been in England a duty to those to whom the plaintiff might have given or sold the article.[7]

38. **Same subject.**—(3) If X, however, knows that the ladder is defective,[8] and particularly if he conceals the defects, and sells it nevertheless, the courts treat this as fraud or deceit. The case, therefore, falls more nearly in the first class of § 36 than in the second, and the seller is held to a much greater degree of liability than when he is merely negligent. This exact case arose in Schubert v. J. R. Clark Co.,[9] where the defendant manufacturer concealed the defect in the ladder with varnish. He, the defendant, sold it to a dealer who in turn sold it to the plaintiff, who was injured by a fall due to the defect in the ladder. The plaintiff was allowed to recover from the manufacturer.[10]

A. The Duty of the Occupier of Land.

39. **Duty to a user of the public highway.**—In § 35 it was noted that the duty owed by an occupier of land as to keeping his premises safe varies greatly,

[7] But see Farrant v. Barnes, 11 C. B. (N. S.) 553 (Eng.).

[8] State v. Fox, 79 Md. 514, 29 Atl. 601. (Horse with glanders.) The case is also rested on the "dangerous to life" principle.

[9] 49 Minn. 331, 51 N. W. 1103.

[10] So in Lewis v. Terry, 111 Cal. 39, 43 Pac. 398, a dealer who knowingly sold a defective folding bed to a boarding-house keeper was held liable to a boarder who was injured by it.

depending upon who the person is that complains of his conduct.

A traveler upon a public highway ordinarily has no right to deviate therefrom, and, if he does, he becomes a trespasser upon the land adjacent thereto. From this it might be argued that if he inadvertently gets upon such land (mistake being generally no excuse for a trespass), there is no greater duty owed to him than to any other trespasser. However, one using the highway, although proceeding with due care, might easily because of darkness, or a fall, unintentionally get across the boundary line which separates the highway and the adjacent property. If the land occupant were allowed to excavate his property clear up to this imaginary line, he would make even careful and lawful travel on the highway dangerous.

40. **Same subject—Continued.**—If the danger was there when the road was dedicated, it must be taken that the public has accepted the highway as it is, and the land occupant owes no duty to make a change in or to guard his premises;[11] but if the road was safe when it was dedicated, the land occupant must not make a change in the condition of the adjoining premises so near the highway as in fact to endanger the traveler who is lawfully upon it.[12] The instance most frequently found in the cases is that of digging an excavation along the road, but there seems no reason why the placing of objects which might be run into by a slight deviation or which

[11] Fisher v. Prowse, 2 B. & S. 770 (Eng.).
[12] Barnes v. Ward, 9 C. B. 392 (Eng.).

might by their unusual nature frighten a horse would not come under the same rule.[13]

If the excavation is at some distance from the way, the rule does not apply. There can be no definite mathematical rule stating how many feet must intervene. To be unlawful, the object or pit must substantially adjoin the highway. It is a matter of probability of danger. If the excavation or object does in fact endanger the traveler, the defendant will be liable.[14]

41. **Duty to a trespasser.**—If the person injured is a trespasser in any other way than that set forth in the preceding section, he is such a wrong-doer that he enters on another's land absolutely at his own risk as to any dangers that passively exist upon it. That is, the occupier owes no duty whatever to a trespasser to keep his premises in a safe condition. Thus, in Sullivan v. Boston & A. R. R. Co.,[15] a person who had been playing ball climbed upon the defendant's building to recover the ball, which had lodged there. There was an unguarded live electric wire upon the building and the trespasser came in contact with it and was killed. It was held that the defendant was not liable. If the defendant had known that persons were accustomed to climb on the roof, the result would probably have been different, under the rule of § 42.[16] In Ponting v. Noakes,[17] the defendant was

[13] Brown v. E. & M. Ry. Co., 22 Q. B. D. 391 (Eng.).

[14] Binks v. S. Y. Ry., 3 B. & S. 244 (Eng.); Norwich v. Breed, 30 Conn. 535, LEADING ILLUSTRATIVE CASES.

[15] 156 Mass. 378, 31 N. E. 128. See to same effect Anderson v. Ft. Dodge, etc., Ry., 150 Iowa 465, 130 N. W. 391.

[16] Connell v. Elec. Ry. Co., 131 Iowa 622.

[17] (1894) 2 Q. B. 281 (Eng.).

held not liable for the death of the plaintiff's horse from eating yew leaves from a tree upon the plaintiff's land, the horse being a trespasser when it ate them.

However, this does not mean that a land owner can deliberately set a trap for the purpose of harming a trespasser. Thus, in Hooker v. Miller,[18] the defendant set a gun in his vineyard, so arranged that it would be discharged by means of wires or cords which a trespasser would be likely to come in contact with. The plaintiff entered the vineyard to take grapes without the defendant's permission. The gun was discharged by his striking the cords and he was injured. It was held that he could recover. A trespasser is not an outlaw. The land owner would not be justified in shooting him to eject him. He cannot any more eject him by setting a gun trap for him. There is, however, no duty to warn him of his approach to a hidden danger not purposely set.

42. **Same subject—Affirmative acts.**—While the land occupier is under no duty to keep his premises safe for trespassers, his exemption does not extend to affirmative acts of a negligent character when he is aware of the trespasser's presence. Thus, in Herrick v. Wixom,[19] the plaintiff had crawled under a circus tent and had taken a seat. The defendants, as part of the performance, exploded a giant firecracker, but did it with so little care for safety that a piece of it struck the plaintiff in the eye. He was allowed to recover. Some states assert that a land occupier is

[18] 37 Iowa 613, LEADING ILLUSTRATIVE CASES.
[19] 121 Mich. 384, 80 N. W. 117, 81 N. W. 333.

liable only for gross and wanton negligence after discovering the trespasser.[20] However, the better view supports the doctrine that he then owes the trespasser a duty of ordinary care.

But here we should distinguish between actually causing an injury and merely failing to prevent a trespasser from injuring himself. In Buch v. Amory Mfg. Co.,[21] the plaintiff was a small boy who came into the defendant's manufacturing plant where dangerous machinery was being run. He did not understand English and hence failed to comprehend a warning to leave. His hand was somehow caught in a dangerous gearing and was injured. He was not allowed to recover, as the defendants owed him no duty to stop their machinery or to forcibly eject him. The courts are not entirely harmonious in their decisions in situations of this sort, where children are involved.

43. **Same subject—Turntable cases.**—There exists in some states a definite, well defined exception to the last stated principle, when the injury is inflicted by a turntable on the defendant's land and the plaintiff is a child. A leading case is that of Keffe v. Milwaukee & St. Paul Railway Company.[22] The defendant company on its own land left a turntable unlocked. The plaintiff, aged seven, and other children, trespassed upon the defendant's property and revolved the turntable. The plaintiff's leg was caught and crushed. The court held

[20] Maynard v. B. & M. R. R., 115 Mass. 458.

[21] 69 N. H. 257, 44 Atl. 809. See also second case in note 15, page 35.

[22] 21 Minn. 207. See also the first case in Railroad Co. v. Stout, 17 Wall. 657 (U. S.).

the defendant liable on the ground that the turntable was so attractive to children as to constitute an allurement and invitation to them to enter and play with it. The case was one where the danger was created by the failure to guard and not by doing an affirmative act. Moreover, the plaintiff was on the land without the permission and in fact against the wishes of the defendant. It would seem to fall under the general rule that the land owner owes no duty to keep his premises in a safe condition for trespassers. If the Keffe case be admitted to be the law, it is hard to draw the line as to what dangerous articles are to be deemed so attractive to children as to constitute an invitation to them and to require a land owner to use care. It seems to place the duty of looking after children upon every one except the parents. The doctrine is denied by many courts and seems unsound.[23] It is nowhere applied in favor of adults, nor is it often applied to the keeping of useful machinery in a building.[24]

44. **Duty to look out for trespassers.**—In the ordinary case, a land occupier is under no obligation to watch out for and anticipate the presence of trespassers even when he is doing an act of an affirmative character which is likely to cause harm.[25] But if, by reason of special facts which are known to him, he has reasonable cause to believe that trespassers are likely to be present, many courts require him to be on the lookout to anticipate and ascertain their pres-

[23] Turess v. N. Y. S. & W. R. R. Co., 61 N. J. L. 314, 40 Atl. 614, LEADING ILLUSTRATIVE CASES.

[24] Browning v. Canning Co., 132 Iowa 631. See also § 42.

[25] Maynard v. B. & M. R. R., 115 Mass. 458.

ence.[26] This rule is most frequently applied to the operation of railroads, and some courts go so far as to require a railroad to keep a constant watch ahead on the track to discover persons even at places where it has no particular reason to expect a trespasser to be.[27] The rule which more widely prevails, however, is that a railroad owes no duty to a trespasser to watch out for him and ascertain his presence unless it has some particular reason to anticipate his presence at such a place.[28] If it has such cause, it owes him a duty to use due care.[29] When the trespasser's presence is actually observed, the duty arises not to injure him by any act of affirmative negligence.[30]

45. **Duty to licensees.**—A bare licensee is one who without pay enters on premises by the permission of the occupant on matters in which the occupant has no interest. It is commonly said that a "bare licensee must take the license as he finds it;" that is, the land occupier owes him no duty to keep the premises safe.[31] This is true so far as any duty is concerned of repair or even of ascertaining that the premises are out of repair or unsafe. Thus, in Fitzpatrick v. Cumberland Glass Mfg. Co.,[32] a boy who was passing through a gate to carry dinner to his father was struck by the gate falling. This was held to be only

[26] Connell v. Elec. Ry. Co., 131 Iowa 622, 109 N. W. 177; Cincinnati Ry. Co. v. Smith, 22 Ohio St. 227.

[27] Jeffries v. Seaboard Air Line R. R. Co., 129 N. C. 236, 39 S. E. 836.

[28] Fearons v. K. C. Elev. Ry. Co., 180 Mo. 208, 79 S. W. 394. See §§ 69 to 74.

[29] Myers v. B. & M. R. R., 72 N. H. 175, 55 Atl. 892.

[30] See § 42.

[31] Gautret v. Egerton, L. R. 2 C. P. 371 (Eng.), LEADING ILLUSTRATIVE CASES.

[32] 61 N. J. L. 378, 39 Atl. 675.

passive negligence and no recovery was allowed, as the fall was caused solely by neglect to repair. However, such a licensee has at least the right that a trespasser has to be protected against any act of affirmative negligence when the occupant is aware of his presence,[33] and against any purposely injurious act. Further than this, the occupant cannot without notice change the premises in such a way as to create a new and concealed peril. In the case of Carskaddon v. Mills,[34] the defendant, desiring to withdraw a license to cross his premises, stretched across the way a strand of barbed wire. The plaintiff had no notice of this and drove his horse in the dark against the wire. He was allowed to recover for the injuries which the animal sustained.

46. **Same subject—Duty to give warning.**—Besides the foregoing duties, the land occupant owes a licensee the duty to give warning of the presence of any concealed danger of which the occupant is aware and of which the licensee is not aware.[35]

One class of bare licensees is excepted from the rule of Gautret v. Egerton. When a carrier undertakes to transport a person, even though gratuitously, it owes him as great a duty as though he had paid for the service. It must, therefore, use due care to avoid injuring him.[36]

The possessor of a license granted for pay is in a better position than a bare licensee. He is treated

[33] Gallagher v. Humphrey, 6 L. R. 684 (Eng.).

[34] 5 Ind. App. 22, 31 N. E. 559.

[35] Gautret v. Egerton, L. R. 2 C. P. 371 (Eng.), LEADING ILLUSTRATIVE CASES.

[36] Harris v. Perry & Co., L. R. (1903) 2 K. B. 219 (Eng.).

as an invitee or business visitor, and the land occupier owes him the additional duty of using due care to inspect and keep his premises in a safe condition.[37]

47. **Duty to invitees.**—In case the land occupier has not merely given one a permission to enter upon his land, but has extended him an invitation to enter, he owes him, in addition to the duties owed to a bare licensee, also a duty to use reasonable care to maintain his premises in safe condition.[38] One who comes upon another's premises on business, in which the occupant has a pecuniary interest, comes within this rule. Thus, in Garfield & Proctor Coal Co. v. Rockland-Rockport Lime Co.,[39] the defendant was the owner of a dock for the discharge of cargoes. There was a ledge of rock in the bottom of the dock of which the defendant could have known by the exercise of due care. The vessel of the plaintiff, carrying coal to the defendant, entered the dock, grounded and sustained injuries. The plaintiff was allowed to recover. In Ganley v. Hall,[40] the plaintiff went on the premises of the defendant to borrow money from one who was not a money lender.

In Faris v. Hoberg,[41] the plaintiff went on the defendant's premises looking for a drayman who had no connection with the defendant's affairs. As each went on his own affairs and not on the business of the defendant, he was regarded as no better

[37] Francis v. Cockrell, L. R. 5 Q. B. 501 (Eng.); Schofield v. Wood, 170 Mass. 415, 49 N. E. 636.

[38] Indermaur v. Dames, L. R. 1 C. P. 274 (Eng.); Chapman v. Rothwell, E. B. & E. 168 (Eng.).

[39] 184 Mass. 60, 67 N. E. 863.

[40] 168 Mass. 513, 47 N. E. 416.

[41] 134 Ind. 269, 33 N. E. 1028.

than a mere licensee and was held not entitled to recover for an injury due to the unsafe condition of the premises.

As to the status of the merely social visitor, the English and American courts show a difference of opinion. In England, he is classed as a bare licensee. In this country, the tendency is to apply to him the same rules as those applied to a business visitor, when he is present at the request, express or implied, of the occupant. Thus, in Davis v. Central Society,[42] a churchgoer was allowed to recover for injuries sustained by reason of the unsafe condition of the church premises.

A hotel guest who pays his way, of course, comes under the rule of Francis v. Cockrell;[43] that is, he is in the position of an invitee.

B. Breach of a Statutory Duty.

48. **To whom duty is owed.**—In instances where the common law has created no duty,[44] the legislature may step in and create a duty, or it may extend a duty already existing to a still larger class than that to which it is already owed; or, again, that body may make more stringent an existing common law duty.

When the legislature designates who shall have a right of action under a statute, the meaning of the

[42] 129 Mass. 367. In Benson v. B. T. Co., 77 Md. 535, 26 Atl. 973, the members of a graduating class on a tour of inspection were deemed mere licensees. Firemen are deemed mere licensees. Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182.

[43] See note 37, page 41; also § 46.

[44] Compare § 35.

statute is evident. But where the legislature does not in terms give any individual a cause of action, it becomes a matter of construction to determine whether or not the legislature intended any individual to be able to sue for damages arising out of a breach of the statute, and, if so, who. If no penalty is prescribed, the natural inference is that, there being otherwise no way to compel a compliance with the statute, the persons who were intended to be protected by the statute have a cause of action, if they are harmed by its violation. If a penalty is prescribed for the benefit of the state, and some form of relief is also given to the individual harmed, the general presumption is that this relief was intended to mark his sole rights under the statute. Thus, in Grant v. Slater M. & P. Co.,[45] the statute required the owner of buildings of a certain height to erect fire-escapes. The plaintiff was a tenant and thus obviously one for whose protection the statute was enacted. However, he was not allowed to recover, inasmuch as the same statute gave him a right to enjoin the owner from permitting the building to go unprotected by fire-escapes.

If a penalty is prescribed to go to the state, and no individual is mentioned, the question is a close one, and is purely one of legislative intent, as disclosed by the particular statute. In Willy v. Mulledy,[46] a tenant in a tenement house was held entitled to recover from the owner under a fire-escape statute similar to the one above mentioned, but which pre-

[45] 14 R. I. 380.
[46] 78 N. Y. 310.

scribed for its violation only a fine. In Atkinson v. Newcastle Waterworks,[47] the statute required the water company, under a penalty of £10 for each violation, to maintain a certain fire pressure. The plaintiff, one whose house had been burned, was not allowed to recover, although the pressure had been deficient, as the legislature was not thought to have intended the creation of an individual duty to him. Of course, if the statute was not meant to protect the particular plaintiff who sues, he cannot recover, although the statute may have given a right to sue to some other individual. Thus, in Western Ry. v. Mutch,[48] the defendant ran its trains through a town faster than the ordinances permitted. A small boy attempted to jump on the train while it was in motion, but fell from it and was injured. It was held that the railroad violated no duty to one who attempted to jump on the train, although it did violate a duty to one who might be legitimately crossing its tracks.

The foregoing paragraphs refer to situations where one is attempting to recover under a statute. If the act of which he complains is also actionable by him at common law, independently of the statute, he can take his choice, disregard the statute and sue on the common law liability,[49] unless the statute has by necessary implication taken away from him that right.

49. **Nature of duty—Whether violation is negligence.**—It may, of course, have been the intention

[47] 2 Ex. Div. 441 (Eng.).
[48] 97 Ala. 194, 11 So. 894.
[49] Clare v. N. Y. & N. E. R. R. Co., 172 Mass. 211, 51 N. E. 1083.

of the legislature only to require of the person on whom a duty has been enjoined to use reasonable care to comply with the statute. In this event, the inquiry becomes the same as in a negligence case, "Did the defendant act as a reasonably prudent man would have acted under the circumstances?" This is often construed to be the extent of the responsibility created when the duty has been imposed on public boards and the like. However, the legislative intent is usually much stronger. If it be, then it is quite immaterial whether or not the defendant has acted with due care or indeed has gone beyond this in his efforts. The question ceases to be one of negligence, but the person on whom the duty is enjoined acts at his peril of failure to discharge the duty.

Thus, in St. Louis, etc., R. R. v. Taylor,[50] the federal statute had provided that "no cars shall be used in interstate traffic which do not comply with the standard" as to the height of the draw-bars. The railroad had originally provided standard height draw-bars, but these, it was shown, wore rapidly. The railroad had then provided trainmen with metal wedges, or "shims," to put under the worn bars to bring them up to proper height. It was held that this reasonable effort did not discharge the duty owed under the statute and that the railroad was liable for an injury caused by the lowered draw-bars. In such cases it is not profitable to inquire, "Did the defendant act as a reasonably prudent man?" The legislature has established a fixed standard for the conduct of the individual. His conduct in violating the statute is illegal

[50] 210 U. S. 281, 28 Sup. Ct. 616.

and if this illegality causes harm to one to whom a legal duty is created, he is liable for the resulting damage. Most courts say this is "negligence per se."[51] It is preferable to say that the defendant is liable on the statute for his illegal conduct irrespective of negligence. In some jurisdictions, it is said that the violation of a statute is only "evidence of negligence." While this is true of statutes of the first type mentioned in this section, it is not true of those of the second type, and the confusion has probably come about through failure to note that the question at bottom is one of legislative intent. What the intent was in a given statute can only be determined by its careful construction, the presumption ordinarily being that the statute must be complied with at one's peril. If such is the construction, it follows that the violator is liable irrespective of whether his act is one which a reasonable man would ordinarily have done.

50. **Relation of violation to injury.**—To entitle the person in whose favor a duty has been created to recover, the injury must be of the sort that the statute was designed to prevent. In Gorris v. Scott,[52] a statute had been violated which required sheep pens on vessels transporting animals to be of certain sizes and to have footholds. The plaintiff's sheep had been washed overboard, as he claimed, by failure to have these requirements. The act had been passed for sanitary purposes to prevent infection in sheep,

[51] Ives v. Welden, 114 Iowa 476, 87 N. W. 408. Excepting in this sense the discussion of this topic is not considered necessary in an article on negligence.

[52] L. R., 9 Exch. 125 (Eng.).

and therefore the plaintiff could not recover for the loss of the sheep, the injury he had sustained not being of the kind that the statute was passed to prevent.

It is also immaterial that the statute was violated unless the violation was the legal cause of the injury sustained,[53] and unless a compliance with the statute would have prevented the harm. Thus, in Chrystal v. T. & B. R. R.,[54] a railroad failed to give signals required by statute. An infant on the track was run over and killed. The child was so small that the giving of the signals would not under the circumstances have been effective to get him off the track and there was therefore no recovery.

DIVISION III.

The Second Essential: The Breach of the Duty to Use Due Care.

51. **Negligent breach distinguished from wilful breach.**—The second essential of an action for negligence is that the defendant shall have failed to discharge his duty to the plaintiff to use due care. One may have broken that duty either through mere inadvertence or purposely. The former is clearly a case of negligence. Thus, if one who was driving an automobile should become so interested in the landscape that he forgot to look as he turned a corner, he would be guilty of negligence. Negligence often, therefore, involves inadvertence or inattention to the duty to use due care.

[53] Burk v. Creamery Pkg. Mfg. Co., 126 Iowa 730, 102 N. W. 793.
[54] 124 N. Y. 519, 26 N. E. 1103.

When one purposely violates a duty resting on him to use due care, that is, when he is conscious of the fact that he is not using due care, he may do it in any one of at least three states of mind: (1) He may do so with the expectation and desire to cause harm. When both the breach of duty and the harm are intentional, it is wholly improper to speak of the act as a negligent one. This is a wilful tort. (2) He may consciously disregard his duty, knowing that the chances of his injuring some one are very great, but being entirely disregardful of whether or not such an injury will result. This reckless and wanton state of mind is usually regarded, when damage results, as equivalent to an intentional harm rather than to negligence.

Thus, if one were to drive an automobile through a crowded street at an excessive speed, and some one were hurt, his act would be rather a wilful battery than a negligent trespass.[55] Some courts say that this is "constructively intentional."[56]

52. **Same subject.**—(3) When one is conscious that he is not using due care, but expects that no harm will come of it, the authorities are not entirely harmonious as to whether this conduct is to be regarded as wilful or negligent. It is a wilful breach of the duty to use care, but the damage is unintentionally inflicted. It is sometimes said that a man must be deemed to have intended the probable consequences of his acts, but such a maxim is not well applied in

[55] Banks v. Braman, 188 Mass. 367, 74 N. E. 594.

[56] McClellan v. Chippewa, etc., R. Co., 110 Wis. 326, 85 N. W. 1018. And see Barlow v. Foster, next note.

this situation. Some courts have spoken of this as "wilful negligence," but in any proper analysis an act is either wilful or negligent. It cannot be both. Probably it is better, if the chances of a harmful result are small, to consider the act a negligent rather than a wilful wrong. Thus, one who should set out in an automobile with a defective brake, would be guilty of negligence.[57]

The most important reason for drawing a distinction is because of the rule that contributory negligence is a bar to an action brought for negligence, while the same conduct is immaterial if the defendant is guilty of a wilful tort.[58] Then, too, many states require such accuracy in pleading as to refuse a recovery when a wilful tort is plead and a negligent tort is proved, and vice versa.[59]

53. **Nonfeasance and misfeasance.**—A negligent breach of the duty to use due care may come about either because the party on whom the duty rests fails to act when he should act, or because when he acts he acts improperly. Inaction is termed nonfeasance, and improper action is termed misfeasance. It often happens that one owes another no duty to avoid nonfeasance, although he does owe him a duty to refrain from misfeasance. Thus, one ordinarily owes no duty to a man whom he finds ill on the street to aid him, but, if he does aid him, he must use due care in his positive acts.[60]

[57] Georgia Pac. Ry. Co. v. Lee, 92 Ala. 262, 9 So. 230, [illegible] ILLUSTRATIVE CASES; and Barlow v. Foster, 149 Wis. 618, 136 [illegible]

[58] Steinmetz v. Kelly, 72 Ind. 442. See [illegible]

[59] Proctor v. Southern Railway, 64 S. C. [illegible]

[60] See § 34.

Again, one may owe a man a duty only to refrain from misfeasance, and owe another a duty to avoid both misfeasance and nonfeasance. Thus, the land occupier owes a trespasser only the duty to avoid positive misfeasance, but he owes the business visitor the duty to avoid nonfeasance as well.[61] Thus, if the land occupant failed to repair his premises and both trespasser and invitee were hurt, only the invitee could recover; but if he were careless in handling timbers while making the repairs, and both were hurt thereby, both could recover.

54. **Same subject—Omissions in the course of acting.**—We must, therefore, in every case inquire what the legal duty was to the plaintiff before we can say whether another is liable to him for his misfeasance or nonfeasance. In general, every one owes another a duty not to be actively negligent (i. e., guilty of misfeasance) against him. Generally speaking, one does not owe another a duty to avoid nonfeasance.

The case of the land occupier with respect to invitees and to some extent to licensees, and the case of negligent omission by a common carrier or by an innkeeper, are exceptions to the latter rule.

But one must carefully distinguish between omitting to act at all and merely omitting to do something in the course of acting. The former is nonfeasance and the latter is really misfeasance. Most cases of apparently actionable nonfeasance are instances of an act made wrongful by an accompanying or connected omission to act. Thus, if an engineer

[61] See §§ 39 to 47.

starts his train and then neglects to look forward upon the track so as to avoid injuring travelers at crossings, his failure to watch may be a nonfeasance, but the driving of the locomotive without watching is a positive misfeasance.[62] An action lies not on the omission, but on an act in the performance of which there is an omission.

A similar question arises in relationships involving contracts. If A had agreed to repair a structure for B, but never appeared to do the work, and B was injured through the structure's subsequent fall, B would have no remedy against A in tort, but only for the breach of the contract.[63] But if A entered upon the performance of the repairs and negligently omitted to prop up a portion of the roof so that it fell on B, B could sue him either in contract or in tort for an omission in the course of acting, amounting to a misfeasance.[64] B's right is just the same as though A negligently threw rubbish off the porch upon B. Each conduct is equally misfeasance.

55. **What is due care?**—The term "due care" has been used thus far without defining it. It has been said that "negligence is the breach of a legal duty to use due care."[65] It will be observed, then, that negligence in its essence is a negative idea. It is the absence of something, i. e., due care. It is conceivable that the law should not hold a man responsible for his acts unless there be in them some degree of

[62] Southern Ry. v. Grizzle, 124 Ga. 735, 53 S. E. 244, LEADING ILLUSTRATIVE CASES.

[63] Tuttle v. Gilbert Mfg. Co., 145 Mass. 169, 13 N. E. 465.

[64] Flint & Walling Mfg. Co., v. Beckett, 167 Ind. 491, 79 N. E. 503.

[65] § 32.

moral blameworthiness; that is, that if he acts according to his best judgment and bona fide, he should not be liable for unfortunate results simply because his judgment was not sound, and because a wiser man than he would not in the same situation have acted as he did. At first sight such a test seems fair; but if the rule were adopted, the standard of care that a man would be required to use in a given set of circumstances would vary with the individual and in each case a judicial inquiry would have to be undertaken as to just what that given individual's capacity and discernment was. This would obviously be a fluctuating and inconvenient test, and one impossible of accurate ascertainment. A more definite standard is absolutely necessary in the administration of judicial affairs, whatever be the merits otherwise of the foregoing test.

The law, in searching for such a definite standard by which to measure conduct, has discarded the test of the particular individual's merit (at least, if he be adult and not physically defective), and instead has chosen the test of a theoretical being who does not actually exist anywhere, namely, the ideal "reasonably prudent and careful man." Baron Alderson has thus defined negligence: "It is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do, under the circumstances."[66] If we assume that

[66] Blyth v. Birmingham Waterworks Co., 11 Exchequer 781 (Eng.). See also Little v. McGuire, 43 Iowa 447.

he speaks of cases where a legal duty exists and where the breach thereof is not wilful, the foregoing statement is an accurate definition of negligence, and it likewise defines due care.

56. **Same subject.**—This statement does not mean that the jury putting itself in the position of the defendant shall inquire, "Would I have done the same thing that he did?" but rather it should ask "Would a reasonably prudent and careful person have done the same as he did?"[67] Again, it would be improper to instruct the jury that the defendant must have used such care as "persons ordinarily use," for the jury may not regard the situation as an ordinary one, nor all persons as reasonably prudent and careful. The proper inquiry is what a reasonably prudent and careful man would have done in the same circumstances in which the defendant was at the time.[68]

57. **Degrees of negligence.**—We find many courts speaking of "slight negligence," "ordinary negligence" and "gross negligence," as though the law affixed some importance to degrees of negligence. For the fixing of responsibility such a distinction is utterly unimportant. The conclusive reason is that negligence is entirely a negation. If a man in his conduct fails to measure up to the standard of a reasonably prudent and careful man, he is liable for negligence whether his conduct falls short of it but slightly, or somewhat more, or very greatly. The case

[67] This point is well brought out in the case of Louisville & N. R. R. Co. v. Gower, 85 Tenn. 465, 3 S. W. 824.

[68] Hanley v. Ft. Dodge Light & Power Co., 133 Iowa 326, 107 N. W. 593, 110 N. W. 579.

is parallel to that of the man who desires to enlist in the army and is deficient in height. It is quite immaterial whether he is one inch too short or four or ten. He will be rejected in all three events.

58. **Degrees of care.**—If it is profitable to inquire into degrees of anything it should rather be to degrees of care than to degrees of negligence that we should turn our attention. There has been much discussion as to whether the law imposes differing degrees of care. In the law of bailments[69] it has been said that the law imposes three different degrees of care, depending on the nature of the bailment; and certain other statements are found, that there are two degrees of care: ordinary care, and that of specialists. But it will be most profitable to say that there are an infinite number of degrees of care (that is, that the circumstances in which men may be are so multitudinous that what a reasonable man would do in each would be different from what he would do in the others); or else, to recognize the fact that in every case the law sets as the one standard, what the reasonably prudent and careful man would do in that case, and requires that conduct of the defendant, and hence that there is just one degree of care for every situation, i. e., the care of the reasonably prudent and careful man under those circumstances. The latter mode of statement is preferable.[70]

Thus, if a man held in one hand a loaded revolver and in the other a cane, the amount of attention he

[69] Story, J., in the case of Tracy v. Wood, 3 Mason 132 (U. S. Circ.); and see subject, BAILMENTS.

[70] Hill v. Glenwood, 124 Iowa 479, 100 N. W. 522, LEADING ILLUSTRATIVE CASES.

should give to the care of each would greatly vary, but the standard of care would be the same, i. e., what a reasonably prudent and careful man would do with each under the circumstances. So the amount of watchfulness which a driver of an automobile should exhibit would depend greatly upon the locality and imminency of danger, but in every situation he should give to his driving that degree of attention which the reasonably prudent and careful man would give: no more, no less.[71]

59. **Standard of care of defectives.**—We have seen that the law ordinarily does not examine into the capacity of the individual to use due care, but takes the unvarying standard of the ordinarily prudent and careful man.[72] It makes no concession to the stupid man but holds him to the higher standard of the reasonable man. Nor does it require the abnormally careful or intelligent man to act up to the best that is in him, but only up to the lower standard of the ordinarily reasonable man. It thus does not make different classes of the insane, the stupid, the average, and the wise man, but holds them all to the same single standard. The curious thing is that the law does not regard the individual's own mental capacity as a part of the circumstances under which he acts. If a person is physically defective, however, the law does not hold him to the standard of care of the physically perfect, reasonably prudent man, but only to the standard of the reasonably prudent man in the same circumstances as the defend-

[71] Thies v. Thomas, 77 N. Y. Sup. 276.
[72] § 55.

ant, i. e., the corresponding reasonably prudent, defective man. That is, the individual's physical defects are regarded as a part of the circumstances under which he acts. Thus, in Hill v. Glenwood[73] a blind man was held to the standard of care of a reasonably prudent blind man, and in Keith v. Worcester, etc., Ry. Co.[74] a person with weak eyes was held to the standard of care of a reasonably prudent weak-eyed person.

60. **Standard of care of minors.**—The law also makes a separate class of children, or perhaps as many classes as there are ages of children. A child is not required to use the degree of care which an adult would use, but only that which a reasonably prudent and careful child of his own age would use.[75] Suppose that the child is backward or precocious, will the law permit an examination into his individual capacity for using care and hold him to the exercise of that which he actually possesses, or will it hold him to that of the ordinarily developed child of his age? The point does not appear to be settled, but some courts view it that such a child belongs in the class in which its capacities place it rather than in that called for by his age alone.[76] A child of such tender years as to be incapable of taking due care is of course not required to measure up to any standard whatever.[77] While the law does not fix any positive

[73] 124 Iowa 479, 100 N. W. 522.

[74] 196 Mass. 478, 82 N. E. 680.

[75] Parker v. Washington Elec. St. Ry. Co., 207 Pa. 438, 56 Atl. 1001, LEADING ILLUSTRATIVE CASES.

[76] Illinois Iron & Metal Co. v. Weber, 196 Ill. 526, 63 N. E. 1008.

[77] O'Brien v. W. C. Ry., 119 Wis. 7, 96 N. W. 424. Robinson v. Cone, 22 Vt. 213.

line, children under seven will rarely be found capable in law of due care.

DIVISION IV.

The Third Essential: Damage to the Plaintiff.

61. **Necessity of damage.**—The action of trespass at common law was one for the invasion of a right by force directly applied. If trespass would lie, the law did not inquire into the question of damage to find whether or not the plaintiff had a cause of action.[78] The infringement of the right was in itself ground for suit, irrespective of harm, though the amount of recovery would be influenced by the amount of harm caused by the trespass.

The action of trespass on the case lay for injuries that were produced indirectly. In it, damage was the whole gist of the action. Without it, the act complained of was not actionable.[79]

If, then, X was negligent in driving a team and almost ran Y down, but did not, and Y was in no wise hurt, trespass would not lie, because there was no contact (i. e., no force directly applied), and case would not lie, because there was no damage. Thus, X may be as negligent as he pleases, as long as he pleases, without incurring legal responsibility, so long as his negligence results in neither physical impact nor harm.

If his negligence results in either impact or harm, then it should become actionable on the foregoing distinctions. When there is harm but no impact, the

[78] Street, Foundations of Legal Liability, vol. III, chap. 17.
[79] Street, Foundations of Legal Liability, vol. III, chap. 18.

case falls usually under some head that is ordinarily discussed under other divisions of the law.[80] When, in the act of X, there is negligence with physical impact but unattended by any real harm, it appears that in modern times courts will not allow an action for negligence.[81] Perhaps this is because either trespass or case could have been brought at common law for negligent contact and in this situation the attributes of case are now required to be shown. In Sullivan v. Old Colony St. Ry. Co.,[82] the plaintiff was a passenger in a street car which was derailed. The plaintiff was somewhat jarred but was not really injured. He was held not to be entitled even to nominal damages.[83]

DIVISION V.

Proof of Negligence.

62. **Who determines the existence of negligence?** —Both the court and the jury have functions to perform in ascertaining whether or not a defendant was negligent. The court must instruct the jury on all questions of law and the jury ordinarily passes on all questions of disputed fact and usually makes the application of the law to the facts. But in some instances the case is so clearly one in which there is no negligence that the court determines the question

[80] See subject, DAMAGES, Liability for Mental Suffering. The courts are divided on the question whether negligent conduct causing fright, which is followed by physical illness, is actionable or not.

[81] Kennedy, J., in Dulieu v. White & Sons, L. R. (1901) 2 K. B. 669 (Eng.).

[82] 200 Mass. 303, 86 N. E. 511.

[83] Trespass would not have lain in this particular suit at common law, as the negligent contact was produced by the act of the defendant's servants and not by the act of defendant himself.

as a matter of law and instructs the jury to find for the defendant. It is hard to lay down an absolute test as to when a case is to be so regarded. It was often said in a former time that the court should so proceed when there was not "a scintilla of evidence." This language is now discarded[84] and the usual way of putting the matter is that "when from the evidence adduced a reasonable inference of negligence could not be drawn by a reasonable man" the court should instruct the jury to find for the defendant.[85]

The court has a right to set aside a verdict of a jury which it believes is contrary to the evidence, but a court ordinarily hesitates to assert this power unless the verdict is so clearly contrary and perverse that mistake or fraud are apparent.[86]

63. **Burden of proof.**—As it is an affirmative part of his case to prove all the elements of his action, a plaintiff has the burden of proving that the defendant owed him a duty of due care, that he violated this duty and that the plaintiff suffered harm thereby. Whether there is a duty owed to the plaintiff is ordinarily a question of law, but it sometimes involves an application of law to controverted facts. If it does, the jury must make this application. The other two matters are questions of fact ordinarily.

We have seen that the law in a few instances makes certain sorts of conduct "negligence per se;"[87] that is, the plaintiff need offer no proof that the conduct

[84] Offut v. World's Columbian Exposition Co., 175 Ill. 472, 51 N. E. 65.

[85] Metropolitan R. R. Co. v. Jackson, L. R. 3 App. Cas. 193 (Eng.); Wakelin v. L. & S. W. Ry. Co., 12 A. C. 41 (Eng.).

[86] Waters v. Bristol, 26 Conn. 398.

[87] See § 49.

was negligent and the defendant is not allowed to offer proof or argue that the conduct was not negligent. This is what is sometimes spoken of as a conclusive presumption of negligence.

64. **Res ipsa loquitur.**—To say that the burden of proof is on the plaintiff means in a negligence case (1) that the plaintiff must first come forward with some evidence tending to show negligence on the defendant's part sufficient to go to the jury, and (2) that he must ultimately convince the jury by a preponderance of the evidence that the defendant was negligent. Both of these duties are taken off his hands in the situation spoken of last in the foregoing section. There is a further doctrine that is sometimes invoked to take off his hands the first of these two duties in still other situations. This is called the rule of *res ipsa loquitur* (i. e., the thing speaks for itself).

"Whenever a thing is shown to be under the management of the defendant and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence that the accident arose from want of care."[88] This is known as the doctrine of *res ipsa loquitur*. It is a difficult thing to state in just what situations the law will say that the accident is of this kind,[89] but when it is so considered, the consequence is that the plaintiff in such an instance sufficiently shows a case of negligence to have the jury pass on it. The second duty in bear-

[88] Earle, J., in Scott v. London Docks Co., 3 H. & C. 596, at p. 601 (Eng.).
[89] Wigmore on Evidence, § 2509.

ing the burden of proof still rests on him, however. That is, the jury are authorized to draw the inference that the defendant was negligent, but are not compelled to do so.[90]

65. **Same subject—Illustrations.**—In Carmody v. Boston Gas Light Co.,[91] gas escaped from the defendant's pipes and was inhaled by the plaintiff while he was asleep. The plaintiff asked the judge to rule that as a matter of law the breaking of a pipe and the consequent escape of gas proved negligence. The court refused to do so, but ruled that these facts were consistent enough with negligence to justify the jury in finding upon them alone that the defendant was negligent. In the following sorts of situations the doctrine has been applied: where a building or a part of a building has fallen; where a train has become uncoupled, or a collision has occurred, or a car has been derailed; where a passenger has been thrown down by a sudden lurch; where sparks have escaped from a locomotive; and many others.

[90] Palmer Brick Co. v. Chenall, 119 Ga. 837, 47 S. E. 329.
[91] 162 Mass. 539, 39 N. E. 184.

CHAPTER III.

CONTRIBUTORY NEGLIGENCE.

66. **Meaning of the term.**—Although it appears in a given case that the defendant owed the plaintiff a duty to use due care, that he violated this duty and that the plaintiff suffered an injury due in a legal sense to this violation of duty, still the plaintiff will fail of a recovery if it further appears (1) that his own conduct was not that which a reasonably prudent and careful man would have used under the circumstances, and (2) that this conduct contributed to bring about the harmful result. Such conduct on the part of the plaintiff is called contributory negligence. It will be noticed that we are not concerned here with any question of legal duty on the part of the plaintiff owed to anyone else. The rule is simply that he is barred from recovering for his injury under the foregoing circumstances.

Thus, if one should close his eyes and walk across a crowded thoroughfare, he could not recover from the driver of a vehicle whose attention was temporarily diverted and who thus negligently ran into him. One who visits a menagerie and prods a wild animal into fury cannot complain of an injury resulting from the animal's attack. One who jumps upon or from a swiftly moving car may be barred by this negligence, and so on.

67. **Amount of negligence that will bar.**—It is immaterial whether the plaintiff's conduct falls far short of that of a reasonably prudent and careful man under the same circumstances, or moderately so, or only slightly so. In any of the three events his conduct is negligent, and his negligence is what bars him from a recovery. Of course, if his conduct does not fall short of this standard, he is not guilty of any negligence and he is not barred. In Illinois, there formerly existed a doctrine that the negligence of the defendant and the negligence of the plaintiff should be compared and that the plaintiff should not be barred if his negligence was "slight" and that of the defendant "gross." This doctrine has now been discarded everywhere,[92] excepting that it has been embodied in some modern statutes relating to employees.[93]

68. **Degree of contribution that will bar.**—While the law will not look at the degree of the plaintiff's dereliction, it may look at the nature of the connection between his negligence and the injury. The common-law rule was that the plaintiff was entirely barred if his act contributed essentially to his injury.[94] Many courts have even stated that he is barred if his act contributed "in the least degree" to his injury. But in determining whether or not the plaintiff's act really did contribute at all to his injury or whether his own negligence was so far remote as

[92] City of Macon v. Holcomb, 205 Ill. 643, 69 N. E. 79. But if the defendant's act was wilful, the plaintiff is not barred by his own negligence. See §§ 51 and 79.

[93] Wisconsin, Laws of 1907, chap. 254, p. 496, is typical.

[94] Neal v. Gillett, 23 Conn. 437.

to be in no just sense a contributing factor, it is often necessary to examine the relation and character of his negligence and that of the defendant, as well as the time when each arose and the possibility of each party's having avoided the result. If his negligence did contribute at all to his injury, he cannot recover, but these inquiries go deeper and ask, "Did his negligence *really contribute* to his harm?"

69. **Davies v. Mann.**—In the case of Davies v. Mann,[95] there was first enunciated a doctrine that has materially modified the law's conception of what it means to "contribute" to the injury. Davies had fettered the forefeet of an ass, and had turned him into a public highway. Mann's team, the driver closely following, came down the small hill at the foot of which the ass was grazing, ran into the animal and killed it. Mann set up as a defense that Davies was guilty of contributory negligence in fettering the animal and turning it into the highway. Now, of course, the plaintiff's negligence had something to do with the injury, that is, it "contributed" to it, in a way, according to previous common law conceptions. Yet, if the defendant had deliberately run over the ass, the plaintiff could have recovered,[96] because in no just sense could it be then said that there was any other cause of the injury than the defendant's own wilful conduct. But, although the defendant's servant did not wilfully run the ass down, yet, if he saw the ass there in time to avoid hurting him and notwithstanding was thereafter neg-

[95] 10 M. & W. 546 (Eng.), LEADING ILLUSTRATIVE CASES.
[96] § 52.

ligent, he really had control of the situation and the plaintiff's prior conduct would here, too, seem to be no longer a cause of the result that happened.[97]

It would be the duty of the servant thus situated to use the degree of care which a reasonably prudent and careful man would use under the circumstances before him, these circumstances now involving an observed and existing peril to the ass. If he had time to act carefully, but instead acted negligently, it would seem that the real cause of the injury was the servant's own failure to then use due care and not at all the plaintiff's former act in fettering the ass and turning him into the highway.

70. **"The last clear chance."**—The court instructed the jury that if they thought that the accident might have been avoided by the exercise of ordinary care on the part of the servant, they should find for the plaintiff; and the jury so found. Literally taken, such a statement of the rule would completely overturn the whole doctrine of contributory negligence, for in every instance of negligent conduct, if the defendant had not been negligent, the injury would not have occurred; that is, "he could have avoided the accident by the exercise of due care." This is exactly the gist of every suit for negligence, and what the plaintiff must in the first instance show to fix liability even when the defendant has not plead contributory negligence. Literally taken, then, to hold the defendant liable, this statement of the rule would require nothing more to be shown in a case involving contributory negligence than in one with-

[97] O'Brien v. McGlinchy, 68 Me. 552. Compare § 44.

out contributory negligence. That is, contributory negligence would be immaterial. But what the court probably meant was that if, after the defendant had observed the peril to which the plaintiff's animal was subjected, he still had time, by refraining from further negligence and by using due care henceforth, to avoid the injury, then the prior negligence of the plaintiff was not to be deemed as contributing to the result, because it was in no just sense the cause of the injury which followed. Notwithstanding the plaintiff's prior negligence, the later negligence of the defendant when he had a chance to avoid all injury by the use of due care would be the sole and proximate cause of the harm. In that event the prior negligence of the plaintiff would be only a condition "but for" which the injury would not have happened, and not a cause of its occurrence. This argument seems entirely sound. This doctrine is called the rule of the "Last Clear Chance." It is noticeable that the rule is not to be applied to relieve one who has been negligent from responsibility to a third person who has not been negligent and who has been injured by the concurring negligence of two others.

71. **Extent of adoption of the rule.**—The report of the case of Davies v. Mann does not affirmatively show that Mann's servant observed the ass in time to avoid injuring him. Some courts have therefore assumed that this doctrine does not require that a defendant should actually have known of a plaintiff's peril in time to avoid injuring him, and have also applied the rule where the defendant did not

know of the plaintiff's peril, but ought to have known of it by the exercise of due care.[98] This doctrine is stated most frequently by these courts in cases involving injuries from the operation of trains. Such an application of the rule does totally overturn the whole doctrine of contributory negligence,[99] for it penalizes the second negligence simply because it is last in time and disregards the first simply because it was first. Some courts, observing that the rule conflicts with the doctrine of contributory negligence in an instance of this kind, have assumed that it does so equally in all instances, and seem to refuse to follow the doctrine at all.[1] However, the rule of Davies v. Mann, as explained in § 69, is the law of England and of the overwhelming bulk of American states. Both the broader view and the view that rejects the last clear chance doctrine are in the minority.

72. **The rule applied.**—The question of the applicability of the rule may evidently arise in the four following situations: (1) where the plaintiff was absent and the defendant present at the time of the infliction of the harm; (2) where neither was present; (3) where the defendant was absent and the plaintiff was present; (4) where both were present. The first is illustrated by the case of Davies v. Mann. If Mann's servant had gotten off the vehicle and had

[98] Hutchinson v. St. Louis & M. R. R., 88 Mo. App. 376; Pickett v. Wilmington R. R., 117 N. C. 616, 23 S. E. 264. It will be found that such courts treat plaintiff's negligence as antecedent and hence regard it as a condition rather than a cause.

[99] Compare C. B. & Q. R. R. v. Lilley, 93 N. W. 1012, and Jones v. Charleston & W. C. Ry. Co., 61 S. C. 556, 39 S. E. 758.

[1] Northern Pac. Ry. v. Jones, 144 Fed. 47.

allowed it to go far ahead of him unattended instead, these facts would illustrate the second. If the plaintiff had been present in charge of the ass while it grazed, and if the defendant had left the vehicle and allowed it to go far ahead of him unattended, the third case would be presented; and if the plaintiff had been thus present and the servant had driven carelessly and had thereby run into the animal, we would have the fourth situation.

73. **Same subject—Further applications of the rule.**—In the second situation it is evident that neither would have any greater opportunity than the other to avert the harm. Neither has the "last clear chance" and each, as a plaintiff against the other, would be barred by his own contributory negligence.[2]

In the third situation, if the keeper of the ass saw the unattended team coming down the hill and had time to take the ass out of harm's way and did not, his negligence under those circumstances would bar him if the ass were hurt, and would make him liable to Mann if the vehicle were overturned and injured.[3] If he did not have clear time to take the ass out of the way although he were close at hand, neither could recover against the other, because each was contributorily negligent.[4] If the keeper were asleep or inattentive and did not notice the unattended team, it would not seem that he had any greater opportunity than the driver had who was

[2] Stiles v. Geesey, 71 Pa. St. 439.

[3] Compare Radley v. L. & N. W. Ry. Co., L. R. 1. App. Cas. 754 (Eng.), had the parties been reversed.

[4] Butterfield v. Forrester, 11 East 60 (Eng.).

coming on behind to avert the harm. Each seems to have had the same chance as the other, and therefore each should be barred.[5] However, this situation might be decided unfavorably to the keeper in some courts under the reasoning set out in § 66.[6]

74. **Same subject—The rule applied.**—If both parties were present and each observed the other, as in the fourth situation, it is usually difficult to see how either had any better chance than the other to avert the harm.[7] However, if one had control of the situation and knew of the other's negligence, it would seem that that knowledge and control throws on him a greater duty of care than he would otherwise be under. If he apprehended the situation and did actually have control of it, and the other did not, his is the last clear chance. He is thus liable to the other for any harm he inflicts and is barred by his own negligence if he sustains harm himself.[8]

75. **Care when danger imminent.**—The foregoing doctrine shows that another, by his negligent conduct, may actually impose on one who knows of it, an increased degree of attention and watchfulness, for a reasonably prudent and careful man will increase his circumspection in proportion as a danger becomes imminent. One who knows that another is negligent, cannot proceed as though the other were

[5] O'Keefe v. Chicago, R. I. & P. R. R. Co., 32 Iowa 467.

[6] See note to Bogan v. Carolina Central R. R., in 55 L. R. A., pp. 418-465.

[7] Dyerson v. U. P. Ry. Co., 74 Kan. 528, 87 Pac. 680. Plaintiff attempted to cross a track without looking and was struck by a locomotive on which the engineer was keeping no lookout.

[8] Tuff v. Warman, 5 C. B. (N. S.) 573 (Eng.).

acting carefully. He must adjust his conduct to the circumstances and to dangers which he knows to exist. Due care when a peril is impending is a different thing from due care when no danger threatens.[9] At least this is so when one has time to act or where he enters upon a course of action with knowledge of the dangers accompanying it. This is equally true when one is sought to be held as a defendant and when it is claimed that he is barred by contributory negligence. Thus, the more rickety the sidewalk, the more gingerly must one pick his way across it. The more crowded the street, the more circumspect must one's conduct become in crossing. And this circumspection must increase still further in proportion as the drivers of the vehicles are observed to be inattentive, at least so long as their conduct does not involve an intentional harm.[10]

This will be found to be true in all situations, excepting in those in which the peril comes upon one so suddenly and unexpectedly that he has no time to reflect before he acts. A man is not expected to act instinctively, in an emergency, with the same judgment as he does when his act is deliberate and when he has time for reflection.[11] Not even the reasonably prudent person can, in such circumstances, act with the ability he is presumed to possess.

76. **Care when danger possible but not imminent.** —As the imminency of peril increases the requisite degree of circumspection, so, as the peril fades toward

[9] Zimmerman v. H. & St. J. R. R., 71 Mo. 476.

[10] Hays v. Gainesville St. Ry. Co., 70 Tex. 602, 8 S. W. 491.

[11] We have observed that such conduct is not an intervening cause. Compare § 19.

a mere possibility, the required degree of attention correspondingly becomes less, because this agrees with the customary conduct of a reasonably prudent man. Such a person will not necessarily guard at all against a mere possibility that another may be negligent in the future.[12] Particularly is this true with relation to one's use of his own real property. Here, it seems, one is not required to act at all upon the mere possibility that another man may be negligent in the future or even that an existing negligence on another's part may some time in the future threaten a danger. In Salmon v. D., L. & W. R. R. Co.,[13] the plaintiff had failed to rake up or destroy a quantity of fallen leaves upon his property alongside a railroad track. Combustible materials were likewise upon the railroad right of way and they caught fire from a spark from a locomotive. The defendant insisted that the plaintiff's failure to remove the leaves was contributory negligence, but the court said that the land owner was under no obligation to adjust his affairs to a mere possibility of negligence or harm on the part of his neighbor. The case would be very different if a fire were raging on the defendant's property and the plaintiff stood by and did nothing to remove the dry material. A reasonable man would use reasonable efforts to avert an impending danger, and the law requires nothing more of him. The question turns on the imminency of the peril. This is well illustrated by the case of Brown v. Brooks.[14]

[12] Pollock on Torts (1st ed.), p. 387.

[13] 38 N. J. L. 5, LEADING ILLUSTRATIVE CASES; so also, Kellogg v. C. & N. W. Ry., 26 Wis. 223.

[14] 85 Wis. 290, 55 N. W. 395.

There the plaintiff, a farmer, saw a fire approaching across the prairie for twenty-four hours, but did not take the simple precaution to plough a furrow around his haystack. It was held that he could not recover for its loss.

77. **Care when a third person is in peril.**—If a defendant by his misconduct imperils the life of another, a third person may ordinarily risk his own life to effect a rescue without being deemed guilty of contributory negligence. The law values heroism and does not penalize it, although it is conceivable that a great degree of rashness and precipitateness might be deemed by a jury negligent conduct even in such circumstances. In Gibney v. State,[15] a father plunged into a canal to save his boy and both drowned. A recovery was allowed for the death of each. In Pennsylvania R. R. Co. v. Langendorf,[16] the plaintiff threw himself upon the track and rescued a child, but was himself injured. He was allowed a recovery. In Omaha & R. V. R. R. Co. v. Krayenbuhl,[17] the plaintiff stayed too long on a railroad track to remove a loaded handcar from before an approaching passenger train, and was injured. His object being to save the train, the court held the act not contributory negligence.

Of course, where one was injured while engaged in an act of heroism, he cannot recover from a defendant that was not in fault, even though he was engaged in rescuing another in peril. While one may not be guilty of contributory negligence in running some risk to save animals or inanimate chat-

[15] 137 N. Y. 1, 33 N. E. 142.
[16] 48 Oh. St. 316, 28 N. E. 172, LEADING ILLUSTRATIVE CASES.
[17] 48 Neb. 553, 67 N. W. 447.

tels,[18] obviously a much less amount of risk will be justifiable than in an attempt to save human life.

78. **Care when defendant violates a statutory duty.**—Even though the peril be impending, it may be that the land occupant can persist in making the ordinary and customary use of his own real property. Such is the case where a statute places a burden specifically upon another to do, or to refrain from doing, an act. Thus, in Donovan v. Hannibal, Etc., R. R.,[19] the statute required the railroad company to fence its tracks. It failed to do so and the plaintiff, after a reasonable time had elapsed, pastured his cattle on his land in the customary way. They wandered on the track and were killed. It was held that there was no negligence in his using his own land in a way that was lawful. As the law had placed the duty of fencing on the railroad, it could not shift the burden over on him, nor could any land owner by his wrongful acts control the legitimate uses to which his neighbor's land might be put.

Here, and in cases not involving land, where the defendant has violated a statute, it is a matter of construction of the given statute whether or not a plaintiff's failure to use due care will bar his recovery.[20] The statute may impose so heavy a duty on the one who comes within its terms that it is immaterial whether the plaintiff was injured while not in the exercise of due care. In such a case the legislature regards the defendant's failure to comply with

[18] Liming v. Ill. C. R. R. Co., 81 Iowa 246, 47 N. W. 66. See also § 20.
[19] 89 Mo. 147, 1 S. W. 232.
[20] Compare § 50.

cause to the plaintiff's injury, the purpose of the statute, the harm that it was enacted to prevent, is quite material. In Bosworth v. Swansey,[28] the Massachusetts Supreme Court held that a plaintiff who was traveling on Sunday, in violation of a statute, could not recover from a city for an injury occasioned by a defect in the highway.[29] This case seems to conflict with the principle just stated, although the same result has been reached elsewhere on the ground that a city does not owe a duty of care to one who is using the highway unlawfully.[30] Other courts have held that the purpose of statutes prohibiting acts of labor, etc., on Sunday, is to prevent a desecration of the Sabbath and not to protect travelers and property from harm, and that the illegality (i. e., the mere circumstance that the time of the injury was Sunday) has no causal connection with the injury which the plaintiff has sustained.[31] The latter view is more widely adopted, and seems sounder, particularly in other cases than those involving injuries on a highway. Even the Massachusetts court did not think that the fact that it was Sunday would prevent a traveler on that day from recovering for a dog-bite.[32] The proper principle is that unless the purpose of the statute was to prevent just such injuries as the plaintiff has sustained, he can recover notwithstanding the fact that when he was harmed he was violating a statute. Where the purpose was to

[28] 10 Metc. 363 (Mass.).

[29] The rule has been changed by statute in Massachusetts.

[30] Johnson v. Irasburgh, 47 Vt. 28.

[31] Mohney v. Cook, 26 Pa. 342; Gross v. Miller, 93 Iowa 72, 61 N. W. 385, and Sutton v. Wauwatosa, 29 Wis. 21.

[32] White v. Lang, 128 Mass. 598.

prevent such harm, the illegality in the act is a contributing cause and the plaintiff cannot make the violation of the law the foundation of his claim.[33]

Thus, in another Wisconsin case, the plaintiff attempted to cross a bridge with a traction engine without complying with the statute which required planks to be laid endwise across the bridge. The bridge collapsed, but the plaintiff could not recover, although the bridge was defective. He was not entitled to have the jury guess whether the bridge would or would not have sustained the weight of the engine had the statute been complied with.[34]

[33] Welch v. Geneva, 110 Wis. 388, 85 N. W. 970.

[34] As to what constitutes contributory negligence in defectives and children, see §§ 59 and 60.

CHAPTER IV.

IMPUTED CONTRIBUTORY NEGLIGENCE.

82. **Imputed negligence.**—In the law of master and servant, the master is made responsible for his servant's negligence in the performance of acts which are done within the scope of the latter's employment.[35] This is true whether the master is sued or whether he sues a third person for negligence.[36] This responsibility is created by the peculiar relation of master and servant and rests on principles different from those usually discussed under the term "imputed negligence."

There has been an attempt made in certain other situations to bar, on account of the negligence of some one else, a plaintiff who has personally been guilty of no negligence; that is, it has been urged that the other's negligence should be "imputed" to him.

83. **Carrier's negligence imputed to passenger.**—In Thorogood v. Bryan,[37] the plaintiff's intestate got out of an omnibus in which he was a passenger, and was knocked down and killed by another omnibus owned by the defendant. The drivers of both omnibuses were negligent. The court said that the deceased must be considered so identified with the

[35] See subject, AGENCY.
[36] Nesbit v. Garner, 75 Iowa 314, 39 N. W. 516.
[37] 8 C. B. 115 (Eng.).

driver that the latter's negligence should be ascribed or imputed to him. It is to be noted that the omnibus driver was not the servant of the plaintiff and the result cannot therefore be ascribed to the rule noted in the preceding section. It is difficult to see why the passenger must be deemed to be thus identified. The rule thus announced has been generally rejected in this country and was overturned in England by the case of "The Bernina."[38] The present rule is, therefore, that the negligence of a driver of a vehicle or of an agent of a carrier of any kind cannot be ascribed to the passenger unless the driver was the agent or servant of the passenger. Thus, one who accepts an invitation from an acquaintance to ride will not be barred by that person's negligence,[39] though it should be borne in mind that a reasonably prudent and careful man thus riding upon invitation would under certain circumstances be himself somewhat attentive about keeping a lookout for danger. If such were the case and the plaintiff failed to act as the reasonably prudent man would act, he would be barred by his own negligence,[40] though not by the driver's negligence. Whether he did so act, is a question for the jury.

84. **"Common enterprise" rule.**—In some jurisdictions the rule has been announced that "where several are engaged in a common enterprise wherein each has authority to act for all, the negligence of one in the management of the means to execute the common enterprise will be imputed to all the

[38] L. R., 12 P. D. 36 (Eng.), LEADING ILLUSTRATIVE CASES.
[39] Shultz v. Old Colony St. Ry. Co., 193 Mass. 309, 79 N. E. 873.
[40] Fechley v. Springfield T. C., 119 Mo. App. 358, 96 S. W. 421.

others."[41] Thus, if several should unite to hire a carriage for a ride and one of the number should act as the driver, his negligence would be imputed to the others.[42] It would seem that this rule rests on the principles spoken of in § 82.

85. **Parent's negligence imputed to child.**—Another situation wherein an attempt has been made to "impute" negligence from one person to another is that involving children. In Hartfield v. Roper,[43] a child of two years was left unattended by its custodian. It wandered into the road and was there run down by reason of the defendant's negligent driving. The court held that the negligence of the parent or custodian in failing to care for the child was a contributing factor in its hurt and that this negligence should be imputed to the child. Of course, practically it is true that any recovery which the child could get would largely find its way into the pocket-book of the parents, but it seems unfair that the fault of another should be visited on a child so young as to be incapable of protecting itself or of choosing its protector. The rule here proposed has not appealed to many of the courts and has been rejected in many jurisdictions.[44] Of course, if the child were old enough to be *sui juris* (of his own right), he might be barred by his own negligence.[45]

86. **Same subject—Other instances.**—Some courts attribute the negligence of a bailee, in conduct involv-

[41] Nesbit v. Garner, 75 Iowa 314, 39 N. W. 516.
[42] Wosika v. St. Paul City Ry., 80 Minn. 364, 83 N. W. 386.
[43] 21 Wend. 615 (N. Y.).
[44] Bisaillon v. Blood, 64 N. H. 565, 15 Atl. 147.
[45] See § 60.

ing the article bailed, to the bailor, and thus bar his recovery for injuries to the article.[46] When a person claims an injury to a right which grows out of a relationship, it is frequently held that he cannot recover therefor if the person through whose relationship the right arose was negligent and this negligence contributed to the harm. Thus, if a child is hurt and the father brings an action, not for the child's harm, but for the loss of the services of the child to himself, there is authority for the proposition that the child's negligence bars a recovery. So, if the husband sues for the loss of his wife's services, her negligence contributing to the accident by which he suffered the loss, bars him.[47]

87. **Same subject—Wife's action for her own injuries.**—There is a difference of opinion on the question whether a wife's action for her own injuries is barred by the negligence of her husband contributing to the result. The preferable rule is that his negligence should not affect her. What is injured here is not a right arising out of the marital relation, but the wife's own person. The principle of the case of Railroad v. Honey does not apply and it is difficult to see how she can be barred by his act in any other situation unless he is in fact her agent in the transaction. It may be difficult sometimes to distinguish the case from that involved in the common enterprise rule situation of § 84. Thus, in Yahn

[46] Illinois Central R. R. Co. v. Sims, 77 Miss. 325, 27 So. 527. The better rule and the weight of authority is otherwise.

[47] C. B. & Q. R. R. v. Honey, 63 Fed. 39.

v. Ottumwa,[48] the plaintiff and her husband were riding in a wagon on a city street, the husband driving. He did not drive carefully and ran against a stone which the city had allowed to lie in the street. It was held that his negligence was imputed to the wife and that she could not recover. If she were regarded as a mere passenger, the rule of "The Bernina" would allow her to recover. If the case be one involving a common enterprise, the plaintiff would be barred. If her husband be her agent for driving, the same result would be reached. But it would seem that unless the situation were treated as one of these last two, she ought to be allowed to recover. The case is not one of injury to a marital relationship and hence the fact that the two were married seems immaterial. This last is the view of many cases.[49]

88. **Certain situations discriminated.**—A father cannot recover for the loss of his child's services if the child was injured through the joint negligence of the father and a third party.[50] Nor can he for his wife's services if she be injured under the same circumstances. A sole beneficiary under a statute giving a right of action for the death of a human being cannot recover in some states if his negligence contributed to that death.[51] This last question requires a construction of the particular statute involved. These cases do not involve the doctrine

[48] 60 Iowa 429, 15 N. W. 257. This case is probably overruled in Iowa by Bailey v. Centerville, 115 Iowa 271, and Willfong v. O. & St. L. Ry. Co., 116 Iowa 548.

[49] Louisville, etc., R. R. v. Creek, 130 Ind. 139, 29 N. E. 481.

[50] Glassey v. Hestonville, etc., Ry., 57 Pa. St. 172.

[51] Tucker v. Draper, 62 Neb. 66, 86 N. W. 917.

of imputed negligence, for the plaintiff in each is barred, if at all, by his own contributory negligence and not by that of another.

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LAW OF TORTS

PART IV

DECEIT

BY

EDWARD D. OSBORN*

CHAPTER I.

INTRODUCTION.

1. **Nature of deceit.**—Deceit as a tort consists in wrongfully misleading another to his harm by arousing in him an erroneous belief as to some fact upon which he relies and acts to his damage. The wrongfulness of the misleading conduct depends upon (1) the defendant's intent to influence the plaintiff, and (2) his lack of bona fide belief in the truth of the representation which causes the erroneous belief.[1]

Deceit is unlike most other torts in that the harm to the person injured is self-inflicted, the defendant's part in the causation being limited to influencing the conduct of the former and thus bringing about the act which directly produces the harm.

2. **Injury to B by deceiving A.**—The same deceit which injures A by influencing his conduct may also

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[1] See §§ 15-18.

result in harm to others through the acts of A induced by it, and may thus create a tort liability toward such persons, or it may create a liability toward them without causing any harm to A. By deceit to induce A to commit some breach of duty to B, or to withdraw his custom from or abstain from dealing with B, may be a tort to the latter. But this phase of deceit is commonly considered in connection with other topics, such as defamation, slander of title, unfair competition, and boycotting.[2] The present article will cover only the tort to the person misled.

3. **Elements of liability.**—There are several elements essential to liability for deceit:

(1) The erroneous belief of the plaintiff;

(2) Its causation by the defendant;

(3) Circumstances which render that causation culpable or wrongful;

(4) The plaintiff's action or change of position in reliance upon the erroneous belief; and

(5) The damage to the plaintiff thereby resulting.

It will be convenient to discuss these elements of liability under two general heads: (1) The wrongful conduct of the defendant; (2) its effect upon the plaintiff.

However, before entering upon a detailed consideration of deceit as a tort, it is important to make a few comparisons and discriminations that will more clearly indicate the nature and extent of the tort liability and distinguish the tort from certain other liabilities and relations with which it is easily

[2] See subject, DEFAMATION

confused. For deceit is on the border line between contract and tort.

4. **Warranty and deceit.**—A statement accompanying the making of a contract may be a part or term of the contract itself or something outside of it, a part of the undertaking of the contracting parties or an extrinsic statement,[3] for not everything that is said or written in the course of making a contract is intended or understood to be a part of the contractual proposition to which the parties bind themselves. When the statement is not promissory, there may often be considerable difficulty in determining whether it is properly to be regarded as a term of the contract, i. e., a contractual assurance of the present or past existence of some state of facts, or as an extrinsic representation whose effect, if any, will be to render the contract voidable or impose a tort liability. In sales of personal property, express assertions regarding the goods made by the seller usually have the force of contractual "warranties," but, if they are false and the other proper elements are present, they may also be actionable as tortious deceit or may render the contract voidable for misrepresentation. A false warranty is actionable without the element of knowledge or bad faith that is essential to the tort of deceit.[4] And liability for deceit may arise from a misrepresentation where no contract at all is made by the parties.

5. **Tort liability distinguished from other effects of deceit.**—Deceit often produces legal consequences

[3] See subject, CONTRACTS, where this matter is discussed.

[4] Mahurin v. Harding, 28 N. H. 128, LEADING ILLUSTRATIVE CASES. See also subject, SALES.

other than the imposition of a tort liability, though in such cases it is usually termed "fraud." A contract or conveyance induced by deceit or "fraudulent misrepresentation" is void or voidable, and the deceived party usually has the option either of avoiding the transaction or suing upon the tort for damages.[5] Where a benefit has been conferred under the influence of deceit, the law imposes upon the fraudulent recipient of the benefit an obligation (quasi-contractual) to restore the benefit or its value to the defrauded party.[6] Fraudulent misrepresentations also frequently have the effect of creating an "estoppel," i. e., imposing upon the maker thereof a legal incapacity to assert the contrary, upon the theory that it is inequitable to do so.[7]

6. **Mistake, misrepresentation, and fraud.**—Mistake, innocent misrepresentation, and deceit or fraudulent misrepresentation form a progressive series of legally effective circumstances. Mistake not induced by the act of the other party frequently has an effect upon the contract or other transaction influenced by it, but it obviously cannot be ground for a tort liability, though it is otherwise when the mistake is the result of a non-disclosure by the other party of that which there is a duty to disclose.[8]

When the mistake or erroneous belief is produced by the representation of the other party to the transaction, but that representation is "innocent," i. e., not accompanied by those circumstances which

[5] See subject, CONTRACTS.
[6] See subject, QUASI-CONTRACTS.
[7] See subject, ESTOPPEL.
[8] See § 7, Passive non-disclosure and duty to disclose.

render it fraudulent, it is generally held at the present day that the transaction is voidable. But innocent misrepresentations are not actionable as torts; fraudulent misrepresentations alone are tortious.[9]

[9] The effect of mistake and misrepresentation upon contracts and conveyances or other legally operative acts is more fully discussed under the respective appropriate titles (e. g., CONTRACTS, Mistake). The absence of liability in tort for a misrepresentation that is not accompanied by fraud is treated in § 18.

CHAPTER II.

THE DEFENDANT'S WRONGFUL CONDUCT.

7. **Active misrepresentation—Passive non-disclosure.**—To be guilty of tortious deceit, one must have caused the erroneous belief which led to the damage. The most obvious case is where he has actively brought it about by words or acts.[10] But, in a sense, one may be said to have caused a thing when, having had an opportunity to prevent it, he failed to do so.

In this way we may speak of deceit by passive non-disclosure; the plaintiff's erroneous belief arises from other sources, the defendant merely remains passive and fails to disclose the facts which would correct that false impression.

The law imposes no general duty actively to prevent threatened harm to others. Consistently with this principle, there is generally no duty to disclose to others whatever one knows that is likely to be of importance to them. Even as between the parties to a contract or negotiation, there is commonly no duty requiring the one party actively to disclose all material facts to the other. Provided no active deception is used or nothing is done to discourage or prevent the other party from discovering the fact,

[10] Most of the cases cited in the notes to this chapter may serve as illustrations. For deceit by conduct, see § 9.

one may remain silent regarding it, even though he is aware of the other's ignorance.[11]

In some particular transactions and special relations, notably in fiduciary relations, wherever confidence is reposed and accepted, there is an affirmative duty upon the one party to disclose to the other all he knows regarding the subject matter of the relation or transaction. A failure to make such disclosures is a fraud.[12]

8. **Active concealment.**—Active concealment should not be confused with passive non-disclosure. Failure to disclose, when accompanied by words, acts or devices designed and calculated to distract the attention of the plaintiff or otherwise prevent him from discovering the truth, ceases to be mere passive non-disclosure; it is a peculiar form of active misrepresentation and is fully as effective in creating tort liability.[13]

9. **Representation by conduct.**—Commonly the active misrepresentation constituting the deceit is an express statement made by spoken or written words. Actions, however, may express a meaning as well as words. A false representation may be made by conduct alone, or partly by conduct and partly by words. If one creates in the mind of another a belief that a certain state of facts exists, by acts that would naturally convey such impression

[11] Laidlaw v. Organ, 2 Wheat. 178 (U. S.); Smith v. Hughes, L. R., 6 Q. B. 597 (Eng.); Newell v. Randall, 32 Minn. 171. Where there is partial disclosure of the facts, partial non-disclosure may cause that which is disclosed to convey a false impression. See §§ 10 and 11.

[12] Fisher v. Budlong, 10 R. I. 525.

[13] Mudsill Min. Co. v. Watrous, 61 Fed. 163; Kuelling v. Roderick Lean Manufacturing Co., 183 N. Y. 78.

to the mind of the ordinary man, the legal effect is the same as if he made such a statement in express words.[14]

In Rex v. Barnard,[15] the fact that the defendant at Oxford appeared in university cap and gown was held a sufficient representation by conduct that he was a member of the university to render him criminally liable for obtaining goods by false pretenses. Similarly, where the defendant, in the assumed character of a porter, delivered to another a mock parcel with a printed ticket, reciting charges for delivery, and received the charges so recited, he was held criminally liable.[16] "Salting" a mine with silver to deceive the plaintiff and induce him to purchase it is fraudulent misrepresentation.[17]

In the sale of goods, the act of making the sale, together with the circumstances under which it is made, is regarded as involving certain implied representations on the seller's part respecting his title to the goods and their quality. It is the doctrine of "implied warranties" and is commonly discussed from the standpoint of warranty rather than from that of deceit.[18]

10. **Meaning of the representation.**—The words are to be taken in the sense in which they were actually understood by the plaintiff, provided that

[14] Rex v. Barnard, 7 C. & P. 784 (Eng.), LEADING ILLUSTRATIVE CASES; Rex v. Douglas, 7 C. & P. 644, note (Eng.), LEADING ILLUSTRATIVE CASES; Mudsill Mining Company v. Watrous, 61 Fed. 163; Swift v. Rounds, 19 R. I. 527.

[15] 7 C. & P. 784 (Eng.).

[16] Rex v. Douglas, 7 C. & P. 644, note (Eng.).

[17] Mudsill Min. Co. v. Watrous, 61 Fed. 163.

[18] See subject, SALES.

is a sense in which they were intended by the defendant, or in which he actually foresaw or ought to have foreseen that they might very likely be understood.[19] It is not a question what the defendant meant by the words, but what the plaintiff reasonably and properly understood by them. One who speaks words is responsible for their reasonably apparent meaning to others, the meaning which they are likely to convey to others; this he ought to foresee and for this he is therefore legally responsible. All the more is he responsible for a certain meaning if he actually foresaw or intended that the words should so be understood.

On the other hand, though one be legally responsible for his words in a certain sense, yet if they are not in fact understood by the other in that sense, but only in another sense for which one is not legally responsible, there is no liability.[20]

It is the representation as a whole, with the meaning given to it by the accompanying acts and the surrounding circumstances, that is to be considered. The literal meaning of the words used often indicates very inadequately the real sense of the representation. While there is ordinarily no duty to dis-

[19] Peek v. Gurney, L. R., 6 H. of L. 377 (Eng.), LEADING ILLUSTRATIVE CASES; Smith v. Chadwick, 9 App. Cas. 187 (Eng.); Arnison v. Smith, 41 Ch. Div. 348 (Eng.); Peek v. Derry, 37 Ch. Div. 541, 587 (Eng.); Newell v. Randall, 32 Minn. 171. Of liability for the intended meaning no doubt has ever been suggested. The other branch of the rule is amply supported by the authorities, which repeatedly assert the defendant's responsibility for the "ordinary" or "reasonable" meaning of the language used, that which an ordinary man would be likely to put upon it, "how a reader of ordinary intelligence would understand it." But see the doubt expressed by Lord Blackburn in Smith v. Chadwick, cited above.

[20] Smith v. Chadwick, 9 App. Cas. 187 (Eng.).

close facts known, yet the partial withholding of facts may give a marked color to that which is disclosed and materially affect the meaning of the representation.[21]

11. **Falsity of the representation.**—To constitute actionable deceit the representation must be false; to tell the truth is justifiable and imposes no liability.[22] But truth of the representation in the sense intended by the defendant is not enough, it must be true in the sense in which the representation is actually and properly understood by the plaintiff.[23] If the plaintiff understands the representation in a sense for which the defendant is not responsible, its truth is obviously immaterial, for the defendant is nowise responsible for its effect, be it true or false. Should the representation, however, be relied upon in a sense for which its maker is legally responsible, then the truth of the statement in that sense becomes material, though the truth or falsity of any other possible meaning which it might possess is immaterial.

The words used may be literally true, but if the impression which the statement, as a whole, creates is not true, the representation is false. Partial withholding of facts will often render a statement false; if the defendant suppresses a material fact, and such suppression renders what he has said untrue, or

[21] Smith v. Chadwick, 20 Ch. Div. 27, 36, 58 (Eng.); Newell v. Randall, 32 Minn. 171; Boyd's Ex'rs v. Browne, 6 Pa. 310; Kidney v. Stoddard, 7 Met. 252 (Mass.).

[22] This is asserted or assumed in all the cases. Compare the similar principle in defamation.

[23] Smith v. Chadwick, 20 Ch. Div. 27, 46, 64, 9 App. Cas. 187 (Eng.).

causes it to convey, as a whole, a false impression, he is liable.[24]

12. **Nature of the representation—Future facts.**—To be actionable as tortious deceit, the misrepresentation must relate to present or past facts. It must be a statement of a fact and not a mere opinion, and it must not relate merely to some future event or act by way of promise or prediction, or assertion of probability or expectation.

A statement that some event will or will not happen in the future is not actionable deceit.[25] He who makes such a prediction is not answerable for its fulfillment. To induce subscriptions to stock, for instance, by representations that the value of the lands of the subscribers will be greatly increased by a proposed railroad, that it will enable them to sell their wheat for a higher price, and that the company will pay large dividends (which predictions are not realized), is not fraud.[26]

Similarly, a promise that is subsequently broken is not deceit. If the requisites of a binding contract are present, there may be a liability for breach of contract, but no tort; and if the agreement is not valid as a contract, there is no liability at all.[27] In Long v. Woodman,[28] the defendant and another, having lent money to the plaintiff, induced him to convey to

[24] See § 10, n. 21.

[25] Sawyer v. Prickett, 19 Wall. 146 (U. S.); Holton v. Noble, 83 Cal. 7.

[26] Sawyer v. Prickett, 19 Wall. 146 (U. S.). A prediction is a form of opinion, and is actionable if made in bad faith. French v. Ryan, 104 Mich. 625; Gerhard v. Bates, 2 El. & Bl. 476 (Eng.). Compare § 13.

[27] Long v. Woodman, 58 Me. 49; Union Pacific Ry. Co. v. Barnes, 64 Fed. 80.

[28] 58 Me. 49.

them certain land by orally promising that upon repayment of the money they would reconvey the land. It was held that their refusal to reconvey upon tender of the money was not actionable as a tort.

Where a representation is made as to present design or intent, while the subsequent failure to execute such design or intent will not amount to actionable fraud, there is fraud if, at time of the assertion, the intent or design is not in fact entertained.[29] In a leading English case,[30] it was held that it is actionable deceit to induce advances of money to a company by false statements regarding the objects for which the money is desired.

A promise impliedly includes an assertion that the promisor intends to perform the act promised. If the promisor does not at the time have such intent, there is a false statement of fact and the promise is fraudulent.[31] This principle has its most important application in purchases of goods on credit by one who is insolvent. The insolvency of the buyer and his knowledge thereof will not be sufficient to constitute fraud, for he may none the less intend and expect to pay.[32] But if, at the time he purchased, he intended not to pay or knew that he would not be able to pay, he is guilty of fraud.[33] It has been held that to constitute fraud there must be an intent

[29] Edgington v. Fitzmaurice, 29 Ch. Div. 459 (Eng.), LEADING ILLUSTRATIVE CASES; Swift v. Rounds, 19 R. I. 527, LEADING ILLUSTRATIVE CASES.

[30] Edgington v. Fitzmaurice, 29 Ch. Div. 459 (Eng.).

[31] Swift v. Rounds, 19 R. I. 527, LEADING ILLUSTRATIVE CASES; Ayres v. French, 41 Conn. 142; Douthitt v. Applegate, 33 Kan. 395; but see Knowlton v. Keenan, 146 Mass. 86; Gallager v. Brunel, 6 Cow. 346 (N. Y.).

[32] Swift v. Rounds, 19 R. I. 527; Burrill v. Stevens, 73 Me. 395.

[33] Ayres v. French, 41 Conn. 142; Swift v. Rounds, 19 R. I. 527.

never to pay, and that a mere intent not to pay at the time specified is not enough.[34]

13. **Opinions.**—One may freely express his opinions without the risk of being held accountable, should they turn out to be unsound; the law does not require him to be answerable for their correctness. There is no liability in tort to another who is misled by the opinion to his damage, provided it be expressed as an opinion and not apparently as a positive statement of fact.[35] In Gordon v. Butler,[36] where the plaintiff made a loan upon the security of land, relying upon the written certificate of disinterested persons that "in their best judgment" the land was worth a certain amount, it was held, upon the land turning out to be worth much less, that the persons thus certifying were not liable as for deceit.

The expression of an opinion, however, does involve the assertion of a fact, i. e., that the speaker is actually of the opinion expressed. If this assertion is false, if the opinion is not honestly entertained, there is a false representation of fact which, if relied upon to the plaintiff's damage, will constitute actionable deceit.[37] The defendant cannot be

[34] Burrill v. Stevens, 73 Me. 395.

[35] Gordon v. Butler, 105 U. S. 553, LEADING ILLUSTRATIVE CASES; Milliken v. Thorndike, 103 Mass. 382; Hedin v. Minneapolis Medical, etc., Institute, 62 Minn. 146.

[36] 105 U. S. 553.

[37] People v. Peckens, 153 N. Y. 576; Birdsey v. Butterfield, 34 Wis. 52; Smith v. Land and House Property Corporation, 28 Ch. Div. 7 (Eng.), LEADING ILLUSTRATIVE CASES. Probably a *mala fide* statement of opinion, however, would ordinarily be a statement "of an irrelevant fact, for it is of no consequence what the opinion is," unless it be a matter peculiarly within the knowledge of him who makes the statement.

held accountable for the soundness of his opinion, but only for the truth of the statement that he has such an opinion.

After all, though, it should not be forgotten that statements of fact and expressions of opinion differ from each other in degree merely, not in kind. Extreme instances show considerable difference; that which is cautiously expressed as a mere opinion and that which is asserted as an unqualified positive statement of fact are quite unlike and seem to warrant the usual rigid classification into fact and opinion. But, in reality, there is no definite dividing line, the one gradually merges into the other.[38] It is convenient to make the usual discrimination, as has been done above, but, as will be shown in a subsequent section, the same principle of law is applicable to both.[39]

Representations respecting the credit or pecuniary responsibility of a person are in their nature largely expressions of opinion rather than positive statements of fact.[40] Such a representation, however, if false and made in bad faith, without belief that it is true, is actionable deceit.[41] It has been held that

[38] Cowley v. Smyth, 46 N. J. L. 380, LEADING ILLUSTRATIVE CASES; Cummings v. Cass, 52 N. J. L. 77; Cabot v. Christie, 42 Vt. 121.

[39] See § 18.

[40] Haycraft v. Creasy, 2 East 92 (Eng.), LEADING ILLUSTRATIVE CASES.

[41] Pasley v. Freeman, 3 T. R. 51 (Eng.). It matters little whether we call it opinion or statement of fact, the result is the same. From its nature and the attendant circumstances, the representation implies belief of a certain degree of persuasiveness, and if the defendant possesses that degree of belief which he virtually represents that he has, he is free from liability. Haycraft v. Creasy, 2 East 92. See § 18.

Statutes have been enacted in England and in some American states rendering such representations non-actionable unless made in writing.

a representation by a party to a contract, that he is a person safely to be trusted and given credit to, is mere "dealer's talk," and not actionable, though made in bad faith.[42] But misrepresentations made to a commercial agency to be communicated to subscribers of the agency, whereby such persons are induced to extend credit, are actionable as deceit.[43]

Representations of law are normally merely opinions and are subject to the same rules; there is no responsibility generally for the correctness of the representation, though there may be liability in cases of bad faith and especially where confidence is reposed.[44] The question of negligent legal advice or representations is quite a different matter.[45] Statements respecting existing rights and liabilities are often to be regarded as representations of fact, and any representation of law involving as part of it a proposition of fact will be subject, as respects the latter, to the rules governing ordinary representations of fact.[46]

14. **Sellers' puffing statements—Value.**—There is a class of false statements in regard to which sellers of property are given considerable latitude, though less than formerly. The law recognizes the almost universal habit of exaggerated praise and commen-

[42] Lyons v. Briggs, 14 R. I. 222; Jude, Snow & Co. v. Woodburn, 27 Vt. 415.

[43] Eaton, Cole & Burnham Co. v. Avery, 83 N. Y. App. 31, LEADING ILLUSTRATIVE CASES; Tindle v. Birkett, 171 N. Y. 520.

[44] Gormely v. Gymnastic Association, 55 Wis. 350; Townsend & Milliken v. Cowles, 31 Ala. 428; Thompson v. Phoenix Ins. Co., 75 Me. 55; Champion v. Woods, 79 Cal. 17.

[45] See subject, LEGAL CAUSE AND NEGLIGENCE.

[46] Dashiel v. Harshman, 113 Iowa 283; Ward v. Wiman, 17 Wend. 193 (N. Y.); Kehl v. Abram, 210 Ill. 218.

dation of the thing to be sold among vendors, as well as the fact that purchasers rarely rely upon such statements. Therefore, general commendatory statements by a vendor regarding the subject matter of the sale are not regarded as fraudulent, even though known to be false and intended to mislead,[47] provided there is no fiduciary relation between the parties and no definite misstatements of specific material facts are made.[48] This rule appears to be due partly to the fact that such statements are commonly only opinions, partly to the notion that no one is justified in relying upon such "dealer's talk."

False representation, made to induce the purchase of a railroad mortgage bond, that the railroad was good security for the bonds, that the bond was of the very best and safest, and that it was an A No. 1 bond, have been held to be mere "simplex commendatio" and not actionable.[49] On the other hand, the same court has held that, in the sale of promissory notes, false representations that the maker of the notes is a man of property and that the notes are "as good as gold," are actionable fraud.[50]

Representations as to value, when made by the vendor, are not subject to the rule applicable to opinions generally, but to that governing sellers' puffing statements. They are not actionable deceit, even though false to the knowledge of the vendor,

[47] Bishop v. Small, 63 Me. 12, LEADING ILLUSTRATIVE CASES; Deming v. Darling, 148 Mass. 504, LEADING ILLUSTRATIVE CASES.

[48] Allen v. Hart, 72 Ill. 104; Murray v. Tolman, 162 Ill. 417; Mudsill Min. Co. v. Watrous, 61 Fed. 163, 168.

[49] Deming v. Darling, 148 Mass. 504.

[50] Andrews v. Jackson, 168 Mass. 266.

and intended to deceive.[51] But wherever there is a fiduciary relation between the vendor and the vendee, or confidence reposed and accepted (as where the vendor knowingly permits the purchaser to rely upon his actual or professed superior skill or knowledge), then a misrepresentation as to value made in bad faith is actionable fraud.[52] A misrepresentation as to value made, not by the vendor, but by an apparently disinterested person, is to be treated as an ordinary opinion, and is, therefore, actionable if made in bad faith.[53]

There is a conflict of authority upon the question whether statements as to the amount previously offered, given or received for property are to be regarded as statements of a material fact, or as amounting to general assertions of value, but the better view seems to be that such statements are actionable as representations of fact.[54]

15. **Culpability of the defendant.**—Though the defendant may by his representations have influenced the plaintiff's acts to the latter's damage, there will be no tort liability unless the circumstances were such as to render the defendant's conduct culpable.

[51] Harvey v. Young, Yelverton 21, LEADING ILLUSTRATIVE CASES; Speiglemeyer v. Crawford, 6 Paige 254 (N. Y.); Picard v. McCormick, 11 Mich. 68; Manning v. Albee, 11 Allen 520 (Mass.); Kimball v. Bangs, 144 Mass. 321.

[52] Allen v. Hart, 72 Ill. 104; Murray v. Tolman, 162 Ill. 417; Fisher v. Budlong, 10 R. I. 525; Simar v. Canaday, 53 N. Y. 298; Picard v. McCormick, 11 Mich. 68.

[53] Medbury v. Watson, 6 Met. 246 (Mass.).

[54] Stoney Creek Woolen Co. v. Smalley, 111 Mich. 321; Fairchild v. McMahon, 139 N. Y. 290; Ives v. Carter, 24 Conn. 392; Ekins v. Tresham, 1 Lev. 102 (Eng.). The contrary view is taken in many cases. Bishop v. Small, 63 Me. 12, LEADING ILLUSTRATIVE CASES. Van Epps v. Harrison, 5 Hill 63 (N. Y.).

The existence of such culpability depends upon two questions:

(1) Was the defendant's representation so related to the harmful consequence to the plaintiff that he ought to be held responsible for its occurrence? (2) Was there any ground upon which the defendant's act, though so connected with the consequence, may be justified or excused?

Where it was intended by the defendant that the plaintiff should rely and act upon the representation, there is such a relation between the defendant's act and its effect upon the plaintiff as to render the former legally responsible for that effect.[55] If he intended that the representation should come to the knowledge of the plaintiff and be believed, and that the plaintiff should rely and act upon it, then he is legally responsible for that consequence when it occurs and for any harm or loss resulting to the plaintiff thereby, provided harm is a natural result of such reliance. Intent to cause harm to the plaintiff is not necessary;[56] if it is a proximate or natural

[55] Henry v. Dennis, 95 Me. 24; Eaton, Cole & Burnham Co. v. Avery, 83 N. Y. 31, LEADING ILLUSTRATIVE CASES. This is taken for granted in most of the cases.

[56] Cowley v. Smyth, 46 N. J. L. 380, LEADING ILLUSTRATIVE CASES; Foster v. Charles, 7 Bing. 105 (Eng.); Smith v. Chadwick, 9 App. Cas. 187, 201 (Eng.).

Indeed, the motive of the defendant is immaterial, provided there be intent to influence and "scienter." Corrupt motive of gain for the defendant or malicious motive of injury to the plaintiff are not essential to liability. Nor is it important whether the defendant actually received any benefit. Stoney Creek Woolen Co. v. Smalley, 111 Mich. 321. In Pasley v. Freeman, 3 T. R. 51 (Eng.), Buller, J., said: "If A, by fraud or deceit, cheat B out of £1000, it makes no difference to B whether A or any other person pockets the £1000. He has lost his money, and if he can fix fraud upon A, reason seems to say that he has a right to such satisfaction against him."

or likely consequence of the plaintiff's reliance upon the representation, it is sufficient.[57]

This is as far as the authorities generally extend the liability. Yet the usual statement that intent to influence and deceive is necessary to liability for deceit can hardly be accepted as true without some qualification. In accordance with the broad principle that normally, in the absence of some justification, forbids doing that which is likely to cause harm to others—the duty to avoid the causation of reasonably foreseeable harmful consequences—we should expect to find liability for deceit without actual intent to influence or deceive.[58] And to some extent, we do find it. One who makes a representation is responsible for its being understood and relied upon in a sense different from that intended or contemplated; in any sense, indeed, in which as a reasonably prudent man he ought to have foreseen the likelihood of its being understood. This subject has been discussed in a previous section and need not be enlarged upon here.[59]

[57] It must be a proximate consequence. Collins v. Jackson, 54 Mich. 186; Polhill v. Walter, 3 Barn. & Ad. 114 (Eng.). Compare Bosanquet, J., in Foster v. Charles, 7 Bing. 108 (Eng.): "If a person tells a falsehood, the natural and obvious consequence of which, if acted upon, is injury to another, that is fraud in law." See also Fottler v. Moseley, 185 Mass. 563, upon the question what injurious consequences are proximate.

[58] Such expressions as the following are frequently found in the decisions: "The defendant must be taken to have intended, that all such persons should give credit to the acceptance [representation], and thereby act upon the faith of that representation, because that, in the ordinary course of business, is its natural and necessary result." (Polhill v. Walter, 3 Barn. & Ad. 114 (Eng.), per Lord Tenterden, C. J.) This is merely an artificial, though common, way of saying, under the fiction of a presumption, that the defendant is legally responsible for the natural and foreseeable effect of his act upon others. Compare Fottler v. Moseley, 185 Mass. 563.

[59] See § 10.

16. **Representation, to whom made.**—Where a representation is made directly to A, with expectation or intent that A shall rely upon it and be influenced by it, it is sufficient to create responsibility for the intended or contemplated consequence.[60] A representation made to the public generally, or to a certain class of persons, is to be regarded as made directly to all members of the public or of that class, and may be relied upon by any person for whom it is so intended.[61]

If a representation be made directly to A, but with the intent or expectation that it be communicated to B, and that B will rely upon it as a representation of the defendant, and B does so rely upon it, the maker of the representation is responsible.[62] False representations respecting one's pecuniary condition and responsibility, made to a mercantile agency with the object of obtaining credit, to be communicated by the agency to its subscribers, are held actionable under this principle.[63]

The liability of the maker or vendor of a chattel, or of any person who puts out a chattel into the hands of another, for injuries to others than the original recipient, resulting from defects, dangerous incidents or unknown qualities of the chattel, might

[60] This is the normal case.

[61] Smith v. Chadwick, 9 App. Cas. 187 (Eng.); Gerhard v. Bates, 2 El. & Bl. 476 (Eng.); Tindle v. Birkett, 171 N. Y. 520; Eaton, Cole & Burnham Co. v. Avery, 83 N. Y. 31, LEADING ILLUSTRATIVE CASES; Polhill v. Walter, 3 Barn. & Ad. 114 (Eng.).

[62] Stoney Creek Woolen Co. v. Smalley, 111 Mich. 321; Tindle v. Birkett, 171 N. Y. 520; Eaton, Cole & Burnham Co. v. Avery, 83 N. Y. 31; Henry v. Dennis, 95 Me. 24.

[63] Eaton, Cole & Burnham Co. v. Avery, 83 N. Y. 31, LEADING ILLUSTRATIVE CASES; Tindle v. Birkett, 171 N. Y. 520.

be discussed as a phase of the law of deceit. It is usually, however, and more conveniently considered under other topics.[64]

17. **Justification and excuse.**—There are two important grounds of justification or excuse which may be available as a defense to an action for deceit:—truth of the representation and *bona fide* belief in its truth. Truth as a justification has been discussed in an earlier part of this chapter.[65] Knowledge that the representation is false, or lack of belief that it is true, is the element that distinguishes tortious deceit from non-tortious, innocent misrepresentation; it is that which constitutes the "fraud." To tell a falsehood innocently is not actionable; to tell it knowingly (scienter) is a tort. But knowledge is not necessary; it is rather a question of honest belief and good faith, or, according to one view, of negligence as well.

18. **The defendant's knowledge or belief—Scienter.**—The possible states of the defendant's belief regarding the truth or falsity of the representation may be classified thus:

(1) Belief amounting to conviction that it is true (I know; I am satisfied, etc.).

(2) Belief that it is true, yet consciously recognized as not convincing.

(3) Lack of belief that it is true, which may be: (a) Belief or knowledge (conviction) that it is false, or (b) lack of definite belief either way (reckless statements).

[64] See subjects, LEGAL CAUSE AND NEGLIGENCE, SALES.
[65] See § 11.

Belief or knowledge that the statement is false (3, a) renders the misrepresentation inexcusable, so, also, does the lack of any definite belief either way (3, b); he who makes a misstatement which he does not believe to be true is guilty of fraud.[66] One, however, who makes a false representation under bona fide belief that it is true, is excused from liability,[67] at least where his belief is so convincing that he can honestly regard it as virtually amounting to knowledge. In some jurisdictions the rule prevails that bona fide belief in the truth of a statement without reasonable ground for such belief is not an excuse, that the defendant will be liable in such cases of negligent belief.[68] That doctrine, however, is now rejected in England and is not generally followed in this country.[69]

A belief in the truth of a statement may exist, yet accompanied by a consciousness that it is only belief and not what can fairly be called knowledge, that it is not a convincing belief. The effect of such a belief is, perhaps, not wholly settled. But the better view is that one who under such circumstances makes an unqualified assertion that a fact exists or expressly states it as a matter within his knowledge, is guilty of actionable fraud.[70]

[66] Derry v. Peek, 14 App. Cas. 337 (Eng.), LEADING ILLUSTRATIVE CASES; Cowley v. Smyth, 46 N. J. L. 380, LEADING ILLUSTRATIVE CASES; Kountze v. Kennedy, 147 N. Y. 124; Union Pacific Ry. Co. v. Barnes, 64 Fed. 80.

[67] Kountze v. Kennedy, 147 N. Y. 124.

[68] Peek v. Derry, 37 Ch. Div. 541 (Eng.); Smith v. Chadwick, 20 Ch. Div. 27, 44 (Eng.).

[69] Derry v. Peek, 14 App. Cas. 337 (Eng.); Kountze v. Kennedy, 147 N. Y. 124.

[70] Darling v. Stuart, 63 Vt. 570; Cabot v. Christie, 42 Vt. 121; Union Pacific Ry. Co. v. Barnes, 64 Fed. 80.

It is frequently laid down as a rule by the authorities that, if the defendant states a fact as of his own knowledge, when he does not know but merely believes it to be true, he is liable.[71] Generally, this seems to be merely another way of saying that one who states as a positive fact that of which he has not a convincing belief, acts in bad faith and is liable upon that ground. In some cases, however, the underlying notion appears to be that the defendant is liable because he acted negligently.

The unqualified assertion of a fact, alone or coupled with express words indicating knowledge, is to be understood as predicating belief of a greater or less degree of conviction according as the fact asserted is more or less susceptible of exact knowledge; it may indicate what may fairly be called certain knowledge, it may indicate mere belief of less but of varying degrees of persuasiveness; but whatever strength of belief or conviction it implies, that must the defendant have if he would be free from liability.[72] Express words of knowledge are not necessary, within this principle, to make the representation convey the impression of positive knowledge,[73] nor will the presence of such words always give the representation that character.[74] How, as a whole, it is reasonably to be understood, is the test.

[71] Cummings v. Cass, 52 N. J. L. 77; Cowley v. Smyth, 46 N. J. L. 380, LEADING ILLUSTRATIVE CASES; Litchfield v. Hutchinson, 117 Mass. 195; Cabot v. Christie, 42 Vt. 121.

[72] Cowley v. Smyth, 46 N. J. L. 380; Cummings v. Cass, 52 N. J. L. 77; Cabot v. Christie, 42 Vt. 121.

[73] Cummings v. Cass, 52 N. J. L. 77; Cabot v. Christie, 42 Vt. 121.

[74] Haycraft v. Creasy, 2 East 92 (Eng.), LEADING ILLUSTRATIVE CASES; Cowley v. Smyth, 46 N. J. L. 380.

CHAPTER III.

THE EFFECT UPON THE PLAINTIFF.

19. **Relying upon the representation.**—To create liability, the defendant's wrongful conduct must harm the plaintiff by influencing his acts to his damage.[75] It is necessary that the representation should come to the knowledge of the plaintiff, be believed by him to be true, and relied upon as an inducement influencing his conduct. If the misrepresentation has created in the plaintiff a belief in its truth, that the fact stated actually exists, and if, influenced by such belief, the plaintiff has done something or refrained from doing something,[76] with consequent injury to himself or his legitimate interests, the defendant's wrongful conduct has caused harm to the plaintiff and the defendant is liable.

The representation need not be the sole inducement; it is sufficient if it was one of several that operated together to influence the plaintiff's conduct.[77] But if it did not operate at all as a cause of the harmful action or inaction, there is obviously no liability. Where the plaintiff chooses to investigate independently, not trusting to the defendant's representation,

[75] Smith v. Chadwick, 9 App. Cas. 187 (Eng.); Fottler v. Moseley, 179 Mass. 295; Nye v. Merriam, 35 Vt. 438.

[76] Fottler v. Moseley, 179 Mass. 295.

[77] Arnison v. Smith, 41 Ch. Div. 348 (Eng.); Peek v. Derry, 37 Ch. Div. 541 (Eng.); Edgington v. Fitzmaurice, L. R., 29 Ch. Div. 459 (Eng.); Holton v. State, 109 Ga. 127; Matthews v. Bliss, 22 Pick. 48 (Mass.).

and then acts upon the conclusion reached as a result of such investigation, the defendant is not liable, for his representation has not caused the harm to the plaintiff.[78] The representation may be believed by the plaintiff and yet may not influence his conduct, or it may fail to have any influence upon his actions because it did not come to his knowledge or was not understood by him. In neither case is the defendant legally responsible for the consequences of the plaintiff's acts.[79] And should the plaintiff's conduct be influenced by the misrepresentation and yet be harmless in its result, there is no liability.[80]

The damage to the plaintiff is always the result of his own acts or omissions induced by the misrepresentation. It may consist in injury to his person, or to his property, or in any other kind of harm for which the law gives remedy. Ordinarily, the plaintiff is induced by the deceit to enter into some contract or bargain whereby he is the loser, or which in some more indirect way causes harm to him, but the harm may arise independent of any contract.[81]

20. **Negligence of the plaintiff in relying upon the representation.**—Does the contributory negligence rule apply to cases of deceit, so as to bar the

[78] Attwood v. Small, 6 Cl. & Fin. 232 (Eng.); Slaughter's Adm'r v. Gerson, 13 Wall. 379 (U. S.), LEADING ILLUSTRATIVE CASES; Enfield v. Colburn, 63 N. H. 218.

[79] Smith v. Chadwick, 20 Ch. Div. 27, 44, 9 App. Cas. 187 (Eng.); Fottler v. Moseley, 179 Mass. 295; Nye v. Merriam, 35 Vt. 438.

[80] Alden v. Wright, 47 Minn. 225; Nye v. Merriam, 35 Vt. 438.

[81] The damage may consist in refraining from action, from doing something which otherwise would have been done. Fottler v. Moseley, 179 Mass. 295 (plaintiff induced to refrain from making a sale of stock).

plaintiff's right of action upon the ground that he ought not to have relied upon the representation of the defendant, that a reasonably prudent man would not have done so? It has been said that some kinds of representations are of such a character that one would not be justified in relying upon them, and sometimes it has been held that where the means of knowledge (sources of information) are at hand or readily to be reached, the plaintiff ought not to rely implicitly upon the representation of the defendant.[82] But, notwithstanding such statements, it can be regarded as settled law in most jurisdictions, that the plaintiff's negligence in relying upon the representation and not doubting its truth or investigating for himself, is not a defense. He who makes a false representation for the purpose of influencing the conduct of another, cannot justly complain if the latter takes him at his word and relies upon it.[83]

Some actual or apparent exceptions to this rule are, however, generally admitted. Where the plaintiff understands the representation in a sense not intended by the defendant, or relies upon a representation not actually intended for him, he cannot properly rely upon it in a sense other than that in which it reasonably appears to have been intended, nor can he rely on it at all unless it was, or reasonably appears to have

[82] Long v. Warren, 68 N. Y. 426; Gordon v. Parmelee, 2 Allen 212 (Mass.); Schwabacker v. Riddle, 99 Ill. 343; Slaughter's Adm'r v. Gerson 13 Wall. 379 (U. S.), LEADING ILLUSTRATIVE CASES.

[83] Redgrave v. Hurd, 20 Ch. Div. 1 (Eng.); Watson v. Atwood, 25 Conn. 313; Fargo Gas & Coke Co. v. Fargo Gas & Electric Co., 4 N. Dak. 219; Sutton v. Morgan, 158 Pa. St. 204.

been, intended for him, but the true explanation of this is that the defendant will not be held responsible for a consequence not reasonably likely.[84] The doctrine regarding sellers' puffing statements is often explained on the ground that the plaintiff ought not, as a reasonable man, to rely on them, and in some cases it is difficult to find any other plausible explanation. A similar explanation is sometimes given for the rule regarding statements of opinion and representations of law.[85]

When a seller of goods makes a representation or warranty in general terms, it will not cover obvious defects, i. e., defects which are apparent upon casual inspection and which it is reasonable to suppose the buyer must notice; but this is merely an application of the general rule to determine the meaning of the representation. A specific representation or warranty, however, according to the better view, may be relied on notwithstanding that the defect is obvious; and be the representation general or specific, the fact that the defect, though not obvious, could have been discovered by reasonable inspection or investigation, will not take it out of the terms of the representation or render it improper for the buyer to rely on it, though it may be evidence tending to prove that he knew of the defect.[86]

[84] See §§ 10 and 15. If a statement were made which every reasonable man would take as a joke, or as plainly untrue, the defendant could hardly be held responsible for the remote possibility that some one might take it seriously and rely upon it. The ground of non-liability here is that the defendant is not legally responsible for the consequence.

[85] Mudsill Min. Co. v. Watrous, 61 Fed. 163, 167; Stewart v. Stearns, 63 N. H. 99. See §§ 13 and 14.

[86] See subject, SALES.

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Pollock, Torts (8th ed.), ch. 8, § 1; *Clerk & Lindsell,* Torts (4th ed.), ch. 16; *Cooley,* Torts (3rd ed.), ch. 16; *Jaggard,* Torts, §§ 184-194.

In addition to the above general treatises on the law of torts, special works on fraud or deceit may be consulted with profit: *Bigelow,* Fraud, vol. I; *Moncrieff,* Fraud and Misrepresentation, Part I.

Works dealing with the law of contracts and with equity usually contain much upon the subject of fraud that has a close bearing upon the tort of deceit: *Wald's* Pollock on Contracts (3rd ed. by *Williston*), chs. 10 and 11; *Page,* Contracts, chs. 4-10; *Pomeroy,* Equity Jurisprudence (3rd ed.), vol. II, §§ 872-921.

LAW OF TORTS

PART V

DEFAMATION

BY

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CHAPTER I.

ORIGIN AND DEFINITION.

1. **Defamation as a law term.**—Defamation has been judicially defined as "the taking from another's reputation,"[1] and as a false publication which produces "any perceptible injury to the reputation of another."[2] But these general statements fail to show the true nature of defamation as a legal wrong.

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[1] Hollenbeck v. Hall, 103 Iowa 214, 72 N. W. 518, 39 L. R. A. 734, 64 Am. St. Rep. 175, where the court adopts the definition in Webster's dictionary, deriving "defamation" from the Latin word *defamare* (*de* meaning "from" and *fama* in the sense of "good repute"). The better established derivation, however, is from the Latin *diffamare*, signifying "to spread abroad an ill report." See the Oxford English Dictionary, "Defamation." Compare Johnson's Adm'x v. Haldeman, 102 Ky. 163, LEADING ILLUSTRATIVE CASES.

[2] See the remarks of Ladd, J., in Hollenbeck v. Hall, 103 Iowa 214, 72 N. W. 518, 519, 39 L. R. A. 734, 64 Am. St. Rep. 175, 176, quoting from Odgers, Libel and Slander, and from Cooley, Torts, p. 193. See also the remarks of Granger, J., in Mosnat v. Snyder, 105 Iowa 500, 75 N. W. 356.

Much of its doctrine is overlaid with distinctions and limitations which arose from a judicial system that long since passed away. On the other hand, some of the leading distinctions are characteristically modern. It is an old tort which, without losing all its medieval characteristics, has had an important development under modern conditions.[3]

Torts may be divided into four main groups: torts which affect the person, as assault and battery, and false imprisonment; torts which affect the right of possession and ownership of property, as trespass and conversion; torts which affect one's "estate," in the broadest sense of that term, or one's established condition, as deceit and fraudulent trade competition; and torts which, according to circumstances, cause damage to person or property, one or both, such as negligence.[4] Now, it might seem that in this classification, defamation would fall within the first class, as a tort affecting personal rather than property rights. As the law protects the body from assault,[5] even when there is no physical impact nor actual damage, so, it might be urged, the law protects one's good name from insult. There is much in the law of defamation to warrant this.[6] It is true some forms of actionable defamation have no other effect than to make people think worse of the plaintiff in a personal way.[7] Other forms, however,

[3] See Chap. III, § 7.

[4] See the article on Tort by Sir Frederick Pollock, in the Encyclopædia Britannica (11th ed.), vol. 27, p. 66.

[5] See Part I, Trespass.

[6] Johnson v. Bradstreet Co., 87 Ga. 79.

[7] Compare Mr. Odgers' remark on the nature of libel as quoted in Cohen v. New York Times, 153 App. Div. 242 (N. Y.), 138 N. Y. Supp. 206, 208:

no less well established, turn on the property loss. The explanation is found in the fact that at an early day the English common law sought the test of actionable defamation, not in the personal insult but in the temporal damage. The cause for this ceased to operate with the passing of the spiritual courts,[8] but this test has colored the doctrine of defamation ever since, and so markedly that its place in the scheme of torts is in the third class, rather than in the first.

2. **Differences between the two uses of "defamation."**—One result of this is that the word "defamation," as a term of law, does not carry the same meaning as "defamation" in common parlance. The law term is wider in some respects than the lay term, and narrower in some. The law recognizes very clearly that "a good name is rather to be chosen than great riches,"[9] and in the main affords redress against attacks upon it by false statements to others. But there are false statements which are not defamatory in a legal sense, although in a natural and proper sense they are defamatory in the highest degree.[10] For instance, one Dukes falsely said of Clark, in the hearing of others, "Clark has

"Next, the words which are so written or printed or otherwise permanently recorded must be defamatory; that is, they must have injured the reputation of some one, must have made people think worse of him. I do not know that I can give you a better definition of libel than that."

[8] See Chap. III, § 7.

[9] Times Pub. Co. v. Carlisle, 94 Fed. 762, 765.

[10] For illustrations, see Pollard v. Lyon, 91 U. S. 225; Ledlie v. Wallen, 17 Mont. 150, 42 Pac. 289. The law does not defend this class of cases. In some instances the courts, while recognizing the rule of law as existing and binding, have declared it also a disgrace to the state. See the remarks of Mr. Justice Hunter in Ledlie v. Wallen, 17 Mont. 150, 42 Pac. 289, 290.

committed adultery with his sister-in-law." This, however grievous the insult, and however defamatory in the popular sense, was not actionable defamation at common law.[11] So, there was no actionable defamation of the plaintiff, when the defendant falsely declared of him, in the hearing of others: "You are a bankrupt and a swindler. I know why you had to leave Berlin and Staten Island. Your children are thieves and were arrested for stealing."[12]

On the other hand, a false statement may be defamatory in a legal sense although it does not impute blame or moral turpitude, and does not criticise or censure.[13] An article, published bona fide in the defendant's newspaper, stated that the plaintiff was teller of a certain bank, and that while acting in this capacity he became mentally deranged from overwork, and in this condition made injurious statements as to the affairs of the bank. It was held that this publication was defamatory. "The law," said Andrews, J., delivering the opinion of the New York Court of Appeals, "allows this form of action, not only to protect a man's character as such, but to protect him in his occupation also against injurious

[11] Dukes v. Clark, 2 Blackf. 20 (Ind.), where a judgment in favor of the plaintiff for such a charge was reversed, because of the limitation on the scope of legal defamation. It is assumed in this case that adultery is not indictable. The reason will appear later. But if Dukes had said of Clark, even in the hearing of one other, "Clark has killed Kelly's hogs, and Kelly ought to have him bound over," this would have been actionable defamation, Hoover v. Hoover, 5 Blackf. 182 (Ind.), as well as defamatory in a popular sense. As bearing on the general doctrine, see Pollard v. Lyon, 91 U. S. 225.

[12] Kuhne v. Ahlers, 92 N. Y. Sup. 41.

[13] Moore v. Francis, 121 N. Y. 199, 205, 18 Am. St. Rep. 810.

imputations. It recognizes the right of a man to live, and the necessity of labor, and will not permit one to assail by words the pecuniary credit of another, except at the peril, in case they are untrue, of answering in damages."[14] The principle was clearly stated also by a distinguished English judge in 1826: "Whatever words have a tendency to hurt, or are calculated to prejudice a man who seeks his livelihood by any trade or business, are actionable."[15]

3. **Defamation distinguished from kindred legal wrongs.**—Defamation is to be distinguished from kindred legal wrongs.

(1) *Civil and criminal defamation.* In this volume, defamation will be considered only as a civil wrong, a tort; but defamation may be a crime as well as a tort, and between the two there are wide differences. At common law no oral defamation, that is, slander, was a crime,[16] but written or pictorial defamation, that is, libel, might at common law be punishable by indictment.[17] In the law of written defamation also there are marked differences between the civil and the criminal offense.

[14] Moore v. Francis, 121 N. Y. 199, 204, 18 Am. St. Rep. 810.

[15] Bayley, J., in Whittaker v. Bradley, 7 Dowl. & Ry. 649 (Eng.).

[16] State v. McArthur, 5 Wash. 558, 32 Pac. 367. It may be otherwise by statute. See Schultz v. Huebner, 108 Mich. 274, 66 N. W. 57, holding that to say of another, "You are a swindler; you beat the poor people out of their money, and are a cheat and a fraud," is a misdemeanor under the Michigan statute. For defamation as a crime, see subject CRIMINAL LAW.

[17] Commonwealth v. Chapman, 13 Metc. 68 (Mass.). So a statute which provides a punishment for publishing a "libel," without defining the term, is effective because of the common law's recognition of criminal libel. Hartford v. The State, 96 Ind. 461. Or a statute which enumerates criminal libel may have the effect of leaving the scope of criminal defamation untouched. Glassmire v. Judkins, 84 Mich. 447, 47 N. W. 965.

The aim in civil defamation is to safeguard the reputation, the aim in criminal defamation is to guard against a breach of the peace.[18] As a result, criminal defamation may punish the mere insult, although civil defamation requires something beyond the insult. So, "the reputation of the dead receives some degree of protection from the criminal law,"[19] but civil defamation regards "the right of a man during his lifetime to the unimpaired possession of his reputation and good name."[20] A prima facie cause in civil defamation requires publication to a third person,[21] but criminal defamation may be complete with publication only to the person affected.[22] At common law, again, the truth of a libel, while a good defense to the civil claim, was no defense to a criminal prosecution.[23]

(2) *Defamation and slander of title.* Defamation, and especially that form of defamation which is known as slander, is to be distinguished from "slander of title." This is not slander at all in the sense of defamation, properly so called.[24] The term reflects a meaning of the word "slander" which has long since passed. "It is found by the inquest," so runs

[18] Provident Sav. Life Assur. Soc. v. Johnson, 115 Ky. 84, 72 S. W. 754. And see 2 Bishop, Criminal Law, p. 907. Compare with § 9.

[19] Salmond, Jurisprudence, p. 281. See the remarks of Deemer, J., in Bradt v. New Nonpareil Co., 108 Iowa 449, 79 N. W. 122, 45 L. R. A. 681, LEADING ILLUSTRATIVE CASES.

[20] Clerk & Lindsell, Torts, p. 549, and see Chap. III, § 6.

[21] See Chap. IV.

[22] State v. Avery, 7 Conn. 266, 269. *Contra*, State v. Syphrett, 27 S. C. 29, 13 Am. St. Rep. 616, 2 S. E. 624. That publication to a third person is essential to civil defamation, see Chap. IV.

[23] Commonwealth v. Morris, 1 Va. Cas. 175, 5 Am. Dec. 515.

[24] With "slander of title" we have also "slander for defamation of title." See Paull v. Halferty, 63 Pa. 46, 49.

the record of a case in the year 1323, "that John Curteys and John Cordhant have slandered the hedge of Hugh Seld in the fen, whereby the said Hugh has lost the sale of the said hedge to his damage of two shillings."[25] Slander of title is a form of injurious falsehood[26] which in modern law may be said "to consist in the publication of false statements, disparaging the property interests of the plaintiff, with the intention of causing him damage and resulting in actual damage to him."[27] For instance, P was in negotiation with M for the sale of land containing ore; D, knowing the land, falsely and maliciously represented to M that the ore would suddenly run out; in consequence, M refused to purchase. It was held that D was liable to P in damages for slander of title.[28]

The distinction between the two torts is important because of the material differences in their elements.[29] "I am of opinion," said a distinguished judge in a recent case,[30] "that this is not an action for libel or defamation of character. I think it can only be maintained for what is called slander of title—i. e., an action on the case for maliciously damaging the plaintiffs in their trade by denying their title to the use of a certain label, and threat-

[25] See 4 Seld. Soc. Pub. 136; Burdick, Torts, p. 381.

[26] See § 3.

[27] Burdick, Torts, p. 381; Gott v. Pulsifer, 122 Mass. 235, LEADING ILLUSTRATIVE CASES; Potosi Zinc Co. v. Mahoney, 135 Pac. 1078; 2 California Law Rev. 162.

[28] Paull v. Halferty, 63 Pa. 46.

[29] See Chaps. IV, V and VI, as to the elements of the cause in defamation.

[30] Lord Davey, in Royal Baking Powder Co. v. Wright, Crossley & Co. (1901), 18 Pat. Cas. Rep. 95 (Eng.).

ening to sue their customers. To support such an action, it is necessary for the plaintiff to prove (1) that the statements complained of were untrue;[31] (2) that they were made maliciously, i. e., without just cause or excuse;[32] (3) that the plaintiffs have suffered special damage thereby."[33] An excellent illustration of the difference between slander of title and defamation is found in the English case of Hatchard v. Mège.[34] This was a claim for falsely and maliciously publishing a statement calculated to injure the plaintiff's right of property in a trademark. After the commencement of the action, but before judgment, the plaintiff died. It was held that his death put an end to the action so far as it was in the nature of libel, but that the cause survived so far as it was in the nature of slander of title. The plaintiff's executrix, therefore, could continue the suit, and recover on proof of special damage.

(3) *Defamation and injurious falsehood.* In an old case,[35] it appeared that D, speaking of P, an unmarried woman, whom B expected to marry, said to B: "You ought not to marry her, for before God she is my wife." In this there was nothing defamatory of P, yet she was given a judgment for the damage which she had sustained in the loss of her marriage because of D's false and malicious statement. The case is an early instance of a civil wrong that has been more clearly recognized in later times as the

[31] On the difference here between slander and slander of title see § 12.
[32] Compare as to slander, § 14.
[33] Compare as to slander, § 16.
[34] 18 Q. B. D. 771 (Eng.).
[35] Sheperd v. Wakeman, 1 Sid. 79 (Eng.).

tort of injurious falsehood. The two torts have an element in common. The defendant in an action for injurious falsehood, as in an action for defamation, has made a false statement respecting the plaintiff, but in the one case the statement attacks the reputation, in the other it does not. "That an action will lie for written or oral falsehoods not actionable per se nor even defamatory where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander."[36] As in the case of slander of title, the elements of the cause differ materially from those found in defamation. To maintain an action for injurious falsehood, "it is necessary for the plaintiff to prove (1) that the statement was untrue, (2) that it has been the cause of actual damage, and (3) that it was published maliciously."[37]

[36] Bowen, L. J., in Ratcliffe v. Evans (1892), 2 Q. B. 524, 527 (Eng.). See §§ 7 and 8.

[37] Salmond, Law of Torts, p. 454. On what is necessary for the plaintiff to prove in an action for defamation, see Chap. IV.

CHAPTER II.

BY AND AGAINST WHOM DEFAMATION MAY BE BROUGHT.

4. **Who may sue for defamation.**—As a rule the good name of every living person is within the protection of the law of defamation.[38] But at common law defamation of the dead gives no civil cause of action;[39] and a suit for defamation, on what was a valid cause, does not survive the death of either defamer or defamed.[40] A child of tender years can be defamed, and can sue through a guardian or next friend. Thus, an action of slander was successfully maintained where the defendant had said of a child of nine years and nine months, "She stole $90; she is a smart little thief."[41] But as defamation turns on injury to reputation or business standing, children are to a great extent beyond its reach. So, among adults, some forms of defamation, although apparently general in their character, are recognized by the law only when they are shown to have relation to the plaintiff's business, profession, or calling.[42] Thus, "the law has always been very tender

[38] Clerk & Lindsell, Torts, p. 549.

[39] Sorenson v. Balaban, 42 N. Y. Supp. 654; Bradt v. New Nonpareil Co., 79 N. W. 122 (Iowa), LEADING ILLUSTRATIVE CASES; Broom v. Ritchie, 6 F. 842 (Ct. of Sess., Scotch.).

[40] Walters v. Nettleton, 5 Cush. 544 (Mass.).

[41] Stewart v. Howe, 17 Ill. 71. It is significant in this case that by the law of Illinois no child under ten might be punished for larceny. And see Hurst v. Goodwin, 114 Ga. 585, 40 S. E. 764, 88 Am. St. Rep. 43.

[42] See § 8.

of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action, that will not be actionable in case of another person."[43]

In the nature of things, not so many forms of defamation reach a corporation as reach the natural person;[44] but its good name is one of the chief assets of a corporation, and its right to sue for defamation affecting its trade or business is well established.[45] Unlike a corporation, a partnership, in the absence of an enabling statute, may not sue in the partnership name as a legal entity, but the members of the partnership may join in an action for defamation which concerns them as partners. A firm of lawyers successfully maintained an action for libel against a newspaper which published of them, with reference to their defense of a client against a criminal prosecution, that they "had betrayed and sold innocence in a court of justice."[46]

5. **Who may be sued for defamation.**—Legal responsibility for defamation is far-reaching. It is not a question of malice, or of intent, but whether the act of publishing the defamatory statement is in legal effect the act of the defendant. A newspaper publisher whose compositor accidentally placed in the list of bankrupts the name of a firm which was not bankrupt but was to have been

[43] Per curiam in Harman v. Delany, 2 Strange 898, 899 (Eng.).

[44] See § 8.

[45] See the remarks of Dallas, C. J., in Farbenfabriken of Elberfeld Co. v. Beringer, 158 Fed. 802, 804, and see Ohio & Mississippi Ry. Co. v. Press Pub. Co., 48 Fed. 206, LEADING ILLUSTRATIVE CASES.

[46] Ludwig v. Cramer, 53 Wis. 193, 10 N. W. 81.

placed in a list of partnerships dissolved, was held legally responsible although he had no personal knowledge of the matter. So the general manager of an unincorporated newspaper association, formed to furnish certain papers with news at a pro rata cost, has been held liable for the publication of a libel of which he knew nothing until two years afterwards, but which was sent to the papers in the association by a reporter employed by the manager.[47]

[47] Shepheard v. Whitaker, L. R. 10 C. P. 502 (Eng.), LEADING ILLUSTRATIVE CASES; Wahlheimer v. Hardenbergh, 145 N. Y. Supp. 161 (Appellate Division). Two judges dissent on the ground that the relation of principal and agent was not established.

CHAPTER III.

THE TWO SPECIES OF DEFAMATION.

6. **Slander and libel.**—One can be defamed by words spoken, by words written, by signs, by pictures. The general and original term for all kinds of defamation was for a long time the word "slander." Thus, in a law book which long held a foremost place in England and America, Bacon's Abridgment of the Law, slander is described as "the publishing of words in writing or by speaking."[48] The cases still speak, now and then, of "oral slander." And there is at least one instance in which a modern statute referring in terms only to "slander" has been judicially construed as including "libel" also.[49] But as a rule, modern usage limits "slander" to cases in which the defamatory statement is made through words spoken, or "in some other transitory form, whether visible or audible."[50] A gesture, a hiss, or "other inarticulate but significant sound," may be a slander.[51] When the defama-

[48] Bacon Abridg., "Slander," vol. 9, p. 28. So in Espinasse's Nisi Prius, 496 (Eng. 1793).

[49] Johnson's Adm'x. v. Haldeman, 43 S. W. 226 (Ky.), LEADING ILLUSTRATIVE CASES. Under this decision, as late as 1897, "an action for libel is an action for slander."

[50] Salmond, Law of Torts, p. 402.

[51] Salmond, Law of Torts, p. 402. "There are one or two modern developments which may give rise to interesting questions, e. g., the gramophone, the photograph, the cinematograph." Jenks, Digest Eng. Civ. Law, p. 500.

tion is in writing or printing, the customary term is "libel." But writing or printing is not always necessary for libel. It is enough if the defamatory matter is conveyed in some other permanent form. "A statue, a caricature, an effigy, chalk marks on a wall, signs, or pictures may constitute a libel."[52]

It is sometimes said that "slander and libel are different names for the same wrong accomplished in different ways." But the difference is more than this. "There are many legal differences between the two. For instance, libel may be punished both criminally and civilly; and, even in the civil action, no special damage need be alleged, while, in the criminal proceedings, it need not always be proved that the defamatory matter was published to a third person. On the other hand, slander, except in certain cases, is not actionable unless special damage is shown; and it is never punishable criminally. Moreover, the period for bringing an action for slander, where the words are actionable per se, is limited to two years after the commission of the offense; while libel and ordinary slander can be pursued, even civilly, at any time within six years after the commission of the offense, or, in the case of slander, after the occurrence of the damage."[53]

7. **The cause of the difference.**—The differences indicated above reflect, not a mere difference in name for the same wrong accomplished in different

[52] See the remarks of Lopes, L. J., in Monson v. Tussauds Limited (1894), 1 Q. B. 671, 692 (Eng.). In this case the libel consisted in the exhibition of a wax model of the plaintiff in circumstances which exposed him to public obloquy and contempt.

[53] Jenks, Short History of English Law, p. 144.

ways, but a difference in the historical origin of slander and libel. There is no better statement of this important but almost forgotten fact in the history of defamation than the following passages from Mr. Edward Jenks' Short History of English Law:

Origin of slander. "It seems clear that cases of oral slander were, in early times, matter for the local moots. In the records of feudal courts recently published by the Selden Society, we find precedents and forms in slander going back to the thirteenth century; and it can hardly be doubted that this branch of feudal jurisdiction resulted from the absorption of the popular authority of the leet court of the Hundred. In the cases given in the publications referred to, the charges of slander are frequently supplementary to charges of trespass and other offenses against good order; but there seems little reason to doubt that slander alone, at any rate if damage followed, was a generally recognized cause of action, though, probably, in such matters each court had its own rules.

"With the decay of the feudal courts, previously referred to, the jurisdiction in slander appears to have passed, not at first to the king's courts, but to the Courts of the Church. A clause of the statute of 1315, commonly known as *Articuli Cleri,* fully recognized the authority of the bishop in defamation; and we find the King's Bench, in the year 1498, declaring that actions for slander are matter for the spiritual tribunals. It is not until after the crucial years of the Reformation, viz., in the year 1536, that we find an action of slander reported in the King's

Courts; and, as is well known, the jurisdiction of the ecclesiastical tribunals in defamation lingered on, though with diminished vigour, until 1855. From the middle of the sixteenth century, however, it is clear that the action of case for spoken words becomes increasingly frequent in the king's courts; and, in the year 1647, a special text-book on the subject was published by John March, the reporter, and attained considerable favour. * * *"

Origin of libel. "Very different was the history of libel. Probably, in the days before the invention of printing, there were not many opportunities of committing this offense; though there seems little reason to doubt that the ecclesiastical courts, even then, entertained suits for written defamation. But the appearance of the printing press, as has been pointed out in another connection, brought the subject into prominence; and the Court of Star Chamber, though it declined to trouble itself about slander, soon became an active center of criminal prosecutions for libel. Apparently, however, the jurisdiction of the Star Chamber did not exclude the more open jurisdiction of the King's Bench; for, in the well-known Case of Scandalous Libels, which came before the former tribunal in the year 1605, it was resolved, that a libeller shall be punished either by indictment at the common law, or by bill, if he deny it, or *ore tenus* on his confession, in the Star Chamber. The strongly criminal character of the proceedings in libel at that time also emphasized the ruling, that the truth of the libel is no justification for its issue; while a slightly later case in the Star Cham-

ber added the well-known distinction between criminal and civil libel, viz., that the former may be committed without publication to a third party.

"It appears, however, that the Star Chamber itself, at any rate in its later years, adopted the practice of awarding damages to the party injured by a libel, as well as punishment for the criminal offense; and this practice naturally led to the growth of the idea that libel might be treated also as a civil offense. References to a possible action of Case for libel appear in the Reports from the beginning of the seventeenth century; and, on the abolition of the Court of Star Chamber by the Long Parliament in 1641, civil actions for libel begin, though far more slowly than might have been expected, to be reported. A marked survival of the criminal origin of libel is to be found in the rule that, to succeed, even in a civil action, no actual damage need be proved; though the action is, historically, one of Case."[54]

The net result of these historical causes was that "the original common law doctrine of defamation, based upon the nature of the imputation, became stereotyped as the law of spoken defamation, or slander; the doctrine inherited from Roman law, through the Star Chamber, became the law of written and printed defamation, or libel."[55]

[54] Jenks, Short History of English Law, pp. 145, 146, 147. See also, The History of the Law of Defamation, by Mr. Van Vechten Veeder, 3 Columbia Law Review 546-573, 4 Columbia Review 33-56, 3 Anglo-American Legal Essays, p. 446.

[55] Mr. Van Vechten Veeder, in The History of the Law of Defamation, 3 Anglo-American Legal Essays, pp. 447, 448.

8. **The scope of slander.**—The marks of its historical origin are still the characteristic feature of our doctrine of slander. It has no scientific boundary but only a ragged and broken line marking out certain arbitrary classes of cases which the secular courts, from time to time, took over from the church courts. To this, in many a slander case of today, is due a result which seems both absurd and unjust.

In the leading case of Pollard v. Lyon,[56] Mr. Justice Clifford, delivering the opinion of the United States Supreme Court, in 1875, thus classified defamatory statements which give rise to a cause of action for slander: "Oral slander, as a cause of action, may be divided into five classes, as follows: (1) Words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. (2) Words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society. (3) Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment. (4) Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. (5) Defamatory words falsely spoken of a person which, though not in themselves actionable,

[56] 91 U. S. 225.

occasion the party special damage."[57] If a case of oral defamation cannot be brought within some one of these classes, it is not recognized by our courts as slander, however defamatory it may be in fact, except where a statute has come to the aid of the common law. The bearing of this is strikingly shown in the case just referred to. The plaintiff, an unmarried woman, alleged that the defendant, in the hearing of others, had falsely charged the plaintiff with committing fornication. No special damage was alleged. There was a denial. On the trial the jury, under instructions from the court, found a verdict in favor of the plaintiff for $10,000, whereupon the defendant moved an arrest of judgment on the ground that on the facts as pleaded the plaintiff had no cause of action. The motion was sustained by a unanimous Bench. "Unwritten words," said Mr. Justice Clifford, "even if they impute immoral conduct to the party, are not actionable in themselves, unless the misconduct imputed amounts to a criminal offense, for which the party may be indicted and punished."[58]

9. **The scope of libel.**—The archaic limitations on the scope of slander[59] have no place in the doctrine of libel. In the case of Villers v. Monsley,[60] which was an action for libel, tried before the Court of

[57] See as bearing on and illustrating these classes of slander, the following LEADING ILLUSTRATIVE CASES: Findlay v. Bear, 8 S. & R. 571 (Pa.); Whittaker v. Bradley, 7 Dowl. & R. 649 (Eng.); Oakley v. Farrington, 1 Johns. Cas. 129 (N. Y.); Lodge v. O'Toole, 20 R. I. 405; Morgan v. Kennedy, 62 Minn. 348.

[58] Pollard v. Lyon, 91 U. S. 225, 23 L. ed. 308, 311.

[59] See § 8.

[60] 2 Wils. 403, 95 Eng. Reprint 886, LEADING ILLUSTRATIVE CASES.

King's Bench in 1769, the limitations recognized in the law of slander were strongly urged by counsel for the defendant.[61] But they were overruled, one of the justices remarking: "I have no doubt at present but that the writing and publishing anything which renders a man ridiculous is actionable."[62]

A century ago, the question of a fundamental difference between libel and slander came again before the English courts, in Thorley v. Lord Kerry.[63] The charge was that the defendant had written and published of the plaintiff this statement: "I sincerely pity the man (meaning the plaintiff) who can so far forget what is due, not only to himself but to others, who, under the cloak of religious and spiritual reform, hypocritically, and with the grossest impurity, deals out his malice, uncharitableness and falsehoods." On the basis of slander, there was evidently no defamation here. And it was urged on the court by counsel for the defendant that there was no "solid ground, either in authority or principle, for the distinction supposed to have prevailed in some cases, that certain words are actionable when written which are not actionable when spoken."

It was contended, on behalf of the defendant, that

[61] The argument was based upon the defendant's description of the plaintiff as an "old itchy old toad," and the point was that the itch was not a disease within the purview of a cause of slander, which was readily enough established.

[62] Villers v. Monsley, 2 Wils. 403, 404, 95 Eng. Reprint 886, LEADING ILLUSTRATIVE CASES.

[63] See 4 Taunt. 355, 3 Camp. 214 (Eng.), LEADING ILLUSTRATIVE CASES. The case was before the Exchequer Chamber, on a writ of error to the King's Bench, in 1812. The opinion was delivered by Lord Mansfield.

all actionable words, written as well as spoken, are reducible to three classes: (1) where they impute a punishable crime; (2) where they impute an infectious disorder; (3) where they tend to injure a person in his office, trade, or profession, or tend to his disherison." Lord Mansfield, delivering the opinion, was clear that the words, "if merely spoken, would not be, of themselves, sufficient to support an action." Speaking for himself, he declared that "he could not upon principle make any difference between words written and words spoken, as to the right which arises on them of bringing an action." But he recognized the authority in favor of the distinction as so strong that the courts could not "venture to lay down at this day that no action can be maintained for any words for which an action cannot be maintained if they were spoken."

The test of libel. With this distinction admitted, the test of libel was found in the fact that "though the words impute no punishable crime they contain that sort of imputation which is calculated to vilify a man and bring him, as the books say, into hatred, contempt, and ridicule." A judgment for the plaintiff, with 20 pounds damages, was therefore affirmed. This general test of libel has been recognized and applied in many subsequent cases.

The tendency is to widen rather than to limit the scope of libel.[64] "Hatred, contempt, *and* ridicule," in the conjunctive, are not necessary; any one of the

[64] See for instance Hulton v. Jones (1910) A. C. 20 (Eng.), LEADING ILLUSTRATIVE CASES; Peck v. Tribune Co., 214 U. S. 185, 29 Sup. Ct. Rep. 554, LEADING ILLUSTRATIVE CASES; Munden v. Harris, 134 S. W. 1076 (Kan.), LEADING ILLUSTRATIVE CASES.

three, even ridicule alone, is sufficient, provided there is defamation. "A written or printed statement or article, published of or concerning another, which is false and tends to injure his reputation and thereby expose him to public hatred, contempt, scorn, obloquy or shame, is libellous per se."[65]

"Public" hatred and contempt. The hatred or contempt is customarily described as "public." Here again, the tendency is to construe the term liberally in favor of recognizing a right of action.[66] "An unprivileged falsehood," said Mr. Justice Holmes in Peck v. Tribune Co.,[67] "need not entail universal hatred to constitute a cause of action. No falsehood is thought about or even known by all the world. No conduct is hated by all. That it will be known by a large number, and will lead an appreciable fraction of that number to regard the plaintiff with contempt, is enough to do her practical harm."[68]

Damage to business. Within the scope of libel also, as of slander, falls a considerable class of cases in which the false statement conveys an imputation calculated, not to bring the plaintiff into hatred, contempt, or ridicule, but to damage him in his trade.[69] The limits of libel may, therefore, be

[65] Martin, J., delivering the opinion of the New York Court of Appeals in 1904, in Triggs v. Sun Printing and Publishing Association, 179 N. Y. 144, 153, 71 N. E. 739, 103 Am. St. Rep. 841, 66 L. R. A. 612, LEADING ILLUSTRATIVE CASES.

[66] Peck v. Tribune Co., 214 U. S. 185, 29 Sup. Ct. Rep. 554, L. Ed., LEADING ILLUSTRATIVE CASES.

[67] Same case.

[68] Same case.

[69] Moore v. Francis, 121 N. Y. 199, 203; Capital and Counties Bank v. Henty, L. R. 7 A. C., 741, 771 (Eng.), where Lord Blackburn remarks: "A

drawn thus: the publication, by writing, print, picture, effigy, or similar means, of a false statement which concerns another, and conveys an imputation upon him, calculated to bring him into hatred, contempt, or ridicule, or to damage him in his trade, business, profession, or official position.[70]

libel for which an action will lie, is defined to be a written statement published without lawful justification or excuse, calculated to convey to those to whom it is published an imputation on the plaintiffs, injurious to them in their trade, or holding them up to hatred, contempt or ridicule."

[70] Compare Jenks, Digest Eng. Civ. Law, p. 500.

CHAPTER IV.

THE PLAINTIFF'S CASE IN DEFAMATION.

10. **The prima facie cause.**—The plaintiff's first pleading in an action for defamation frequently does not and should not show all the substantive facts of the complete case which the court will have to consider before entering judgment. A complete case in defamation is pleaded not as an entirety, but by stages. The defendant, perhaps, may be able to claim a privilege for the publication of an admittedly defamatory statement, and the plaintiff may be aware of this. On the other hand, the plaintiff may be able to meet the defense of privilege by a showing of actual malice in the defendant when he used his privilege, and the defendant may be aware of this. But in framing his first pleading, the plaintiff will make no mention either of the defendant's possible claim of privilege, or of the counteracting fact of actual malice in using the privilege. So, the defendant, in framing his plea or answer, will not anticipate the plaintiff's possible reply to it. Each will content himself with his prima facie cause of action or prima facie defense. In this chapter the elements of the plaintiff's prima facie cause in defamation will be considered. The defendant's prima facie defense and also the plaintiff's possible response will occupy the two following chapters.

11. **Defamatory statement.**—The plaintiff in his first pleading must affirmatively show a defamatory statement by the defendant.[71] A "mere intention to vex and annoy will not make language defamatory which is not so in its own nature. An imputation of conduct not in itself really censurable, however distasteful or objectionable the conduct may be according to the notions of certain people, is not a legal injury. 'Would it be libellous,' it has been asked, 'to write of a lady of fashion that she has been seen on the top of an omnibus, or of a nobleman that he was in the habit of burning tallow candles?' There is a distinction between imputing what is merely a breach of professional etiquette and what is illegal, mischievous, or sinful; between, in fact, matters of taste and matters of crime. Thus it has been decided that in humble life 'want of womanly delicacy' is not actionable per se. Nor is it a libel to write of a medical man that he met homeopathists in consultation. A homeopathist may be a perfectly competent and qualified practitioner, and the imputation therefore was not of professional misconduct but simply of a breach of an arbitrary rule."[72]

Latent defamation. The defamatory character of the statement may appear upon its face but "no statement is necessarily and in all circumstances defamatory. There is no charge or imputation, however serious on the face of it, which may not be

[71] On the affirmative nature of Defamation, see Chap. III, §§ 8 and 9.

[72] Clerk & Lindsell, Law of Torts, p. 551, referring to and quoting from the remarks of Pollock, C. B., in Clay v. Roberts, 8 L. T. N. S. 398 (Eng.), and the case of A. B. v. Blackwood, (1902) 5 F. 25 (Ct. of Sess., Scotch).

explained away by evidence that in the special circumstances of the case it was not issued or understood in a defamatory sense. It may be shown to have been made in jest, or by way of irony, or in some metaphorical or secondary innocent sense, and that it was or ought to have been understood in that sense by those to whom it was made. Conversely, no statement is necessarily and in all circumstances innocent. An allegation which on the face of it contains no imputation whatever against the plaintiff may be proved from the circumstances to have contained a latent and secondary defamatory sense. It may suggest an imputation which it does not express. Thus, even the language of praise may be sued on as defamatory, on proof that it was used in the way of irony."[73]

The innuendo. When the defamation is apparent on the face of the statement, it is prima facie actionable; and the burden is on the defendant to show that it is not defamatory. On the other hand, if the statement is apparently innocent, the burden is on the plaintiff to show the defamatory import, as he contends, of the statement. This he may do through a "colloquium."[74] Or, if the application of the defamatory statement is possibly not clear, the plaintiff should point it out in his pleading through an "innuendo."[75]

Pleading the statement. The need of such explan-

[73] Salmond, Law of Torts, p. 409, referring to Boydell v. Jones, 4 M. & W. 446, 51 R. R. 676 (Eng.).

[74] Carter v. Andrews, 16 Pick. 6 (Mass.).

[75] The word from the Latin *innuere*, to nod at, to hint at, was used when the pleading was in Latin. In modern pleadings the word "meaning" is more frequently used; but the Latin term still designates the method.

atory and identifying statements in an action for defamation is due to a rule of common law pleading which has largely survived under code pleading.[76] It was in vain for the plaintiff to allege that the defendant published a libel concerning the plaintiff in his trade "purporting that his beer was of bad quality, and sold in deficient measure," or that the defendant "charged and asserted, and accused the plaintiff, a tradesman, of being insolvent."[77] The defamatory statement itself must be set forth in its very terms; and the plaintiff's first pleading must profess so to set it forth.[78] An averment that the defamatory statement was "to the effect following," or "in substance as follows," setting out the libel in words, was bad on a motion in arrest of judgment, even when the words themselves were set out.[79]

Ironical statements. Thus, a plaintiff sometimes finds it necessary to assert by explanatory matter in his pleading that a statement, quoted verbatim in the pleading, which is laudatory on its face, was in the circumstances of its publication a defamatory statement. In Boydell v. Jones,[80] the plaintiff, a lawyer, succeeds through his innuendo, in showing that the phrase "an honest lawyer," applied to him by the defendant, was defamatory.[81]

[76] See subjects, PLEADING, PRACTICE.

[77] Cook v. Cox, 3 M. & Sel. 110 (Eng.).

[78] Chitty, Pleading (16th Am. ed.), p. 419.

[79] Chitty, Pleading (16th Am. ed.), p. 420, and cases there cited; Harris v. Warre, 4 C. P. D. 125 (Eng.).

[80] 4 M. & W. 446 (Eng.).

[81] Good illustrations of the use of the innuendo in present day pleading under the code will be found in the statement of the case in Triggs v. Sun Printing and Publishing Association, 179 N. Y. 144-151, LEADING ILLUSTRATIVE CASES.

12. **Of and concerning the plaintiff.**—The plaintiff must show also, in his first pleading, that the defamation was of and concerning him. It is not necessary, however, that the reference to the plaintiff be express. It is sufficient if it be so understood even by one person.[82] So the publication of the plaintiff's picture over the name of another person may be defamatory of the plaintiff, if the picture is recognizable and published as a part of a defamatory statement, and this although the statement also does not name the plaintiff.[83]

Defamation of a class. If the defamation is of a class, and not of the plaintiff individually, he cannot succeed in his action.[84] But although the defamatory matter may appear only to apply to a class of individuals, yet if the descriptions in such matter are capable of being, by innuendo, shown to be directly applicable to any one individual of that class, an action may be maintained by him for the publication.[85]

In Le Fanu v. Malcomson, for instance, the owner of a factory in Ireland sued for libel because of an article in the defendant's newspaper stating that "the cruelties of the slave trade or the Bastille are not equal to those practiced in some of the Irish factories." Here there was no direct reference to the plaintiff and no mention specially of the plaintiff's factory. But having established the reference

[82] Salmond, Law of Torts, p. 411.

[83] Peck v. Tribune Co., 214 U. S. 185, 29 Sup. Ct. Rep. 554, L. Ed., LEADING ILLUSTRATIVE CASES.

[84] Comes v. Cruce, 85 Ark. 789, 107 S. W. 185, and case there cited.

[85] Le Fanu v. Malcomson, 1 H. L. Cas. 637 (Eng.).

by means of an innuendo and evidence based on it, he was given a judgment.[86] "Whether a man is called by one name, or whether he is called by another," said Lord Campbell, when this case was before the House of Lords,[87] "or whether he is described by a pretended description of a class to which he is known to belong, if those who look on know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and Christian name were ten times repeated." But it is essential that the innuendo, as in the example given, does not extend the sense of the defamatory matter; it should merely point out the particular individual to whom matter, in itself defamatory, does in fact apply.

Illustration. The application of the principles noticed above can be illustrated from the case of Collins v. Dispatch Publishing Company.[88] The alleged defamatory statement in the defendant's newspaper was in these terms: "Complaints from outside parties were sent to the department, one asking for his dismissal on account of intimacy with a well-known young local elocutionist." In the plaintiff's cause of action, as pleaded, the statement appeared in this form: "'Complaints from outside parties were sent to the department' (thereby meaning the Post-Office Department of the United

[86] Same case. The innuendo following the words quoted in the text was framed thus "(meaning the factory of the plaintiffs, and meaning thereby that the plaintiffs had treated the persons in that employment in said factory with cruelty)."

[87] Le Fanu v. Malcomson, 1 H. L. Cas. 637, 668 (Eng.).

[88] 152 Pa. 187.

States) 'one asking for his' (meaning, thereby, the said Stephen Collins) 'dismissal' (meaning, thereby, his, the said Stephen Collins', dismissal, and meaning, thereby, his, the said Stephen Collins', dismissal from his position, or the office, as Superintendent of Mails in the Pittsburgh Post-Office) 'on account of intimacy' (meaning, thereby, the intimacy of said Stephen Collins, and meaning, thereby, an improper and criminal relation of the said Stephen Collins) 'with a well-known young local elocutionist' (meaning, thereby, that the said Stephen Collins, said plaintiff, had committed the crime of adultery with a certain young woman whose occupation was that of elocutionist)." This statement of the plaintiff's claim was held to be sufficient both in form and in substance, although the court intimated that the innuendo in this case was not needed.

13. **Publication.**—The material part of a cause of action for defamation is not the speaking or the writing of the words, but the publication of them.[89] If his words reach no one but the person defamed, the defendant may speak what slanders he pleases, without legal responsibility for the slander. A sealed letter containing libellous matter communicated only to the person libelled, may give ground for an indictment, but will not sustain a civil action for libel.[90] "There must be communication by the speaker or writer to at least one third person."

This necessary element of the plaintiff's cause is

[89] Hebditch v. MacIlwaine, 2 Q. B. 54, 58 (Eng.); Sheffill v. Van Deuser, 13 Gray 304 (Mass.), LEADING ILLUSTRATIVE CASES.

[90] Edwards v. Wooten, 12 Rep. 35 (Eng.), 77 Eng. Reprint 1316.

technically called "publication." In common parlance the word suggests the act of making known to the public; but in law its meaning is not so limited.[91] "It need not amount to anything like publication in the common usage of the word. That an open message passes through the hands of a telegraph clerk, or a manuscript through those of a compositor in a printing office, or a letter dictated by a principal is taken down in shorthand and typewritten by a clerk, is enough to constitute a publication to those persons if they are capable of understanding the matters so delivered to them. The opening of a letter addressed to a firm by a clerk of that firm authorized to open letters is a publication to him."[92]

14. **Whether falsity of statement is necessary.**— It is essential to the validity of an action for defamation that the defendant's statement be untrue. "For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not to, possess."[93] The plaintiff's first pleading commonly alleges in express terms that the defendant falsely and maliciously published the statement to the plaintiff's damage.[94] But this is not necessary for the prima facie case.

[91] Rex. v. Burdett, 4 B. & Ald. 143 (Eng.); Snyder v. Andrews, 6 Barb. 43 (N. Y.), LEADING ILLUSTRATIVE CASES.

[92] Pollock, Law of Torts (7th edition), p. 245, referring to Williamson v. Freer, L. R. 9 C. P. 393 (Eng.) (telegram); Baldwin v. Elphinston, 2 W. Bl. 1037 (Eng.) (printing); Pullman v. Hill & Co., 1 Q. B. 524 (Eng.) (dictation to stenographer).

[93] Per Littledale, J., in McPherson v. Daniels, 10 B. & C. 263, 270, 5 M. & R. 251, 34 R. R. 397 (Eng.).

[94] Same case.

A denial does not bring it into issue.[95] If P sues D for slander because D called him a thief, P need not allege that he is not a thief;[96] the law gives him the benefit of the presumption of innocence, and throws on the defendant the burden of alleging and proving the truth of his charge.[97]

15. **Whether intent to defame is necessary.**— While it is necessary that there be a defamatory statement published of and concerning the plaintiff, it is not necessary to show that the defendant knew that the matter was defamatory of the plaintiff, or even defamatory of any living person. "The test is whether, under the circumstances in which the writing was published, reasonable men to whom the publication was made would be likely to understand it in a libellous sense."[98] A defamatory skit on "Artemus Jones" appeared in a London paper. There was no intention to describe or refer to any living person. "Artemus Jones," suggested by the name of "Artemus Ward," was intended by the publisher to be a mere imaginary person, to represent a type. But a man by the name of Artemus Jones was living in London. In his suit for libel against the publishers of the paper, the House of Lords held the defendant liable to judgment in the plaintiff's favor for £1,750.[99]

[95] Same case. See Chap. V.

[96] Chapman v. Pickersgill, 2 Wils. 145, 147 (Eng.).

[97] See Chap. V.

[98] Capital & Counties Bank v. Henty, 7 A. C. 741 (Eng.). And see Hulton v. Jones (1910), A. C. 20 (Eng.), LEADING ILLUSTRATIVE CASES.

[99] Hulton v. Jones, (1910) A. C. 20 (Eng.), LEADING ILLUSTRATIVE CASES. And see Shepheard v. Whitaker, L. R. 10 C. P. 502 (Eng.), LEADING ILLUSTRATIVE CASES.

"A man in good faith," said Lord Chancellor Loreburn, "may publish a libel believing it to be true, and it may be found by the jury that he acted in good faith, believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under these circumstances he has no defense to the action."

16. **Whether malice in the publication is necessary.**—It used to be said that malice was an essential element in the plaintiff's case in all actions for libel and slander. The declaration, complaint, or petition in an action for defamation still customarily alleges that the statement was "maliciously" published.[1] But it is evident, in many cases of established defamation, that there was really no malice, no intent to injure, and, sometimes, not even carelessness on the part of the defendant.[2]

Implied malice. The tradition that malice is essential to defamation is still strong; and the courts have met the situation by a resort to the fiction of "implied" malice. Thus it was recently remarked from the bench of the Maryland Court of Appeals: "Malice has always been divided into two kinds—implied malice, or malice in law; and express malice, or malice in fact. The first is shown by mere proof of the unauthorized use of the de-defamatory words charged. The second may be shown by the acts or conduct of the defendant imme-

[1] McPherson v. Daniels, 10 B. & C. 263 (Eng.). And see the form books in general use.

[2] Peck v. Tribune Co., 214 U. S. 185, 29 Sup. Ct. Rep. 554, 53 L. ed. 960, LEADING ILLUSTRATIVE CASES; Todd v. Hawkins, 8 Car & P. 888 (Eng.), LEADING ILLUSTRATIVE CASES.

diately accompanying the utterance of the words, or by the utterance at other times of other and similar defamatory words having reference to the subject matter of the words charged. The difference between implied malice and express malice is a difference in kind, rather than in degree, and this distinction should be borne in mind in considering this question."[3] But this is only an indirect recognition of the fact that so far as the plaintiff's prima facie case is concerned "malice is no more an essential element in the wrong of defamation than in that of trespass or conversion."[4]

17. **Whether actual damage is necessary.**— "Torts are of two kinds—namely, those which are actionable per se, and those which are actionable only on proof of actual damage resulting from them. The law sometimes says to a defendant: 'You will be held liable if you do such and such an act. At other times it says merely: 'You will be held liable if, in consequence of such and such an act, damage is inflicted on the plaintiff.'"[5] It is a characteristic feature of the tort of defamation that it falls within both these classes. Libel and some forms of slander are actionable without a showing of actual damage;[6] most forms of slander, however, require a showing of actual damage.[7]

Special damage. When special damage is necessary for the existence of a cause in slander, the

[3] Gambrill v. Schooley, 52 Atl. 500, 508 (Md.).
[4] See Salmond, Law of Torts (2nd ed.), p. 420, note.
[5] Salmond, Law of Torts (2nd ed.), p. 11.
[6] See Chap. III, §§ 2 and 3.
[7] Cooley, Torts (Students' ed.), p. 110.

damage must appear, in the plaintiff's statement of his case, to be the loss of some definite material advantage, and not merely the loss of reputation.[8] A general averment that the plaintiff "has been damaged in her name and fame" is not sufficient.[9] But it is necessary that the plaintiff's first pleading shall "set forth precisely in what way the special damage resulted from the speaking of the words. It is not sufficient to allege generally that the plaintiff has suffered special damages, or that the party has been put to great costs and expenses. By special damage in such a case is meant pecuniary loss; but it is well settled that the term may also include the loss of substantial hospitality of friends. Illustrative examples are given by the text-writers in great numbers, among which are loss of marriage, loss of profitable employment, or of emoluments, profits, or customers; and it was very early settled that a charge of incontinence against an unmarried female, whereby she lost her marriage, was actionable by reason of the special damage alleged and proved."[10]

18. **Summary of essentials.** — These, then, are the essentials of the plaintiff's prima facie cause in libel: (1) a publication by the defendant; (2) of a defamatory statement; (3) concerning the plaintiff. In most cases of slander there is a fourth essen-

[8] Roberts v. Roberts, 5 B. & S. 384 (Eng.).

[9] Pollard v. Lyon, 91 U. S. 225.

[10] Per Mr. Justice Clifford, in Pollard v. Lyon, 9 U. S. 225, referring to Cook v. Cook, 100 Mass. 194; Moore v. Meagher, 1 Taunt. 42; Williams v. Hill, 19 Wend. 306; Davis v. Gardiner, 4 Co. 16 b. pl. 11 (Eng.); Reston v. Pomfreicht, Cro. Eliz. 639 (Eng.).

tial, namely: (4) actual damage proximately resulting to the plaintiff. But there are four rather limited classes of slander in which actual damage is not essential to the existence of the plaintiff's prima facie cause.[11]

If the plaintiff's first pleading fails to show any of these essentials, his case is open to demurrer. If his pleading shows them all, but he fails, under a general denial, to carry the burden of proof as to any one of them, his case fails on the evidence. If he succeeds in establishing all these elements, he is entitled to a judgment unless the defendant has established one of the affirmative defenses recognized in the law of defamation.

[11] See Chap. III, § 8. This enumeration does not include a "libel" which is an injurious falsehood but not defamatory.

CHAPTER V.

THE DEFENDANT'S RESPONSE TO A CHARGE OF DEFAMATION.

19. **In general.**—As against a prima facie cause in defamation pleaded by the plaintiff, the defendant, in addition to the usual responses raising an issue in law, or an issue of fact, or setting up new matter in discharge,[12] has an unusual range of affirmative responses in justification or excuse.[13] These, including some responses that have been attempted and found wanting in defamation, will be noticed in this chapter. It is characteristic of them all that they are coincident with the facts set up by the plaintiff, although in legal theory they form no part of the plaintiff's prima facie case.

20. **Truth as a defense.**—If the defendant pleads and proves that the charge published by him against the plaintiff was true as made, it will be, in a civil action at common law, an absolute defense.[14] Nor will it, at common law, impair this defense if it appear that the publication was made by the defendant from malice towards the plaintiff.[15]

In this respect, however, the rule has been

[12] See the subject, PLEADING IN CIVIL ACTIONS, with references to the demurrer, and the plea or answer.

[13] On the nature of such responses in general, see subject, PLEADING IN CIVIL ACTIONS, in this work.

[14] McPherson v. Daniels, 10 B. & C. 272 (Eng.).

[15] Salmond, Law of Torts (2nd ed.), p. 416.

changed in some states, by constitutional or statutory provisions. Thus, under the Nebraska constitution one who publishes a libel "may not exempt himself from liability for libelling another simply by showing that the charge published was true, but must go further and show that the publication was made under such circumstances as would justify the conclusion that he acted with good motives and for justifiable ends."[16]

An answer of the truth of the charge is not a direct denial of the plaintiff's cause of action, but a collateral matter which, if established by the defendant, will bar a recovery.[17] The defendant, therefore, carries the burden of proof. And his showing of the truth must be "as broad as the defamatory charge."[18]

Whether repetition on authority is a defense. It was once supposed to be an excuse in an action for defamation if the defendant could show that he had merely repeated the defamatory statement and at the time had given the name of his informant.[19] But this view was rejected in England in the year 1829, as to both libel and slander.[20] The doctrine is now established that it is no excuse for his publication of defamation if the defendant shows that he re-

[16] Per Ragan, C., in Neilson v. Jensen, 56 Neb. 430, 76 N. W. 866, applying Art. I, § 5, of the state constitution.

[17] Atwater v. Morning News, 67 Conn. 504, 34 Atl. 865.

[18] Rutherford v. Paddock, 180 Mass. 289, 62 N. E. 381; Thompson v. Pioneer Press, 37 Minn. 285, 33 N. W. 856.

[19] Northampton's Case, 12 Coke 134 (Eng.); Woolworth v. Meadows, 5 East 463, 469 (Eng.).

[20] As to libel, by De Crespigny v. Wellesley, 5 Bing. 392, 401 (Eng.). As to slander, by McPherson v. Daniels, 10 B. & C. 263 (Eng.).

peated exactly what had been told him by another, whose name the defendant gave, or had copied exactly in his newspaper a statement originating elsewhere, or had published it in good faith as an advertisement.[21]

Whether disbelief in the truth of the statement is a defense. The fact also that the defamatory statement was not believed to be true by the person who published it, and that he declared his disbelief in it, does not excuse his publication.[22] So when D, in good faith, repeated to S, a slanderous statement concerning P, and at the same time expressed a disbelief in its truth, and a wish to obtain advice as to the propriety of informing P of the charge, it was held that D was liable in slander, in the absence of any showing that the occasion was privileged.[23] "The injury to the reputation of the slandered person," said the court, "is not repaired by the fact that the words were uttered for the purpose of taking counsel."[24]

21. **Privilege as a defense.**—In a rather wide class of cases the law, out of regard for the public interest, permits a privilege of defamation. This privilege is sometimes absolute; if pleaded and proven by the defendant, the plaintiff has no chance to overcome it. More frequently the privilege is only conditional or qualified—the plaintiff can over-

[21] Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; Peck v. Tribune Co., 214 U. S. 185; Cooley, Torts (Student's ed.), p. 246.

[22] Bishop v. Journal Newspaper Co., 47 N. E. 119 (Mass.).

[23] Branstetter v. Dorrough, 81 Ind. 527.

[24] Per Elliott, J., Branstetter v. Dorrough, 81 Ind. 527, 531.

come it if he can show that it was exercised with actual malice.

Absolute privilege. P sued D for slander, because D had said of P, in the hearing of others, "You are a harpy, preying on the vitals of the poor." D pleaded that he uttered the words while acting as a judge in the trial of a case in which this plaintiff was defendant. The plaintiff replied that the words were uttered falsely, and without reasonable cause, and were wholly irrelevant and impertinent to the cause before the defendant, as the latter well knew. P's demurrer to this reply admitted the facts pleaded. In other words, it appeared that D had defamed P without just cause or excuse. But the court held that as the statement was by a judge on the bench, "no such action as this can, under any circumstances, be maintainable."[25]

The case referred is a typical instance of absolute privilege, and makes clear the reason for it. "It is essential in all courts that the judges who are appointed to administer the law should be privileged to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action

[25] Scott v. Stansfield, L. R. 3 Ex. 220 (Eng.); 37 L. J. Ed. 155, 18 L. T. N. S. 572, LEADING ILLUSTRATIVE CASES.

being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him?"[26]

Out of regard to the public interests, therefore, certain persons are permitted to defame others with impunity. It is not a privilege to the individual, but a privilege to the state. The persons protected occupy in one way or another either a judicial, a legislative, or an executive position. "It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law, but it is the fear that, if the rule were otherwise, numerous actions would be brought against persons who are merely discharging their duty. It must always be borne in mind * * * that it is intended to protect persons acting bona fide, who under a different rule would be liable, not, perhaps, to verdicts and judgments against them, but to the vexation of defending actions."[27]

Thus, the privilege extends to statements, however malicious, made by one who at the time is sitting as judge in a court recognized and constituted by law;[28] to statements made in the course of legislative proceedings, and relating to them;[29] to statements in a petition to the legislature, so far

[26] Kelly, C. B., in Scott v. Stansfield, L. R. 3 Ex. 220 (Eng.), LEADING ILLUSTRATIVE CASES.

[27] Per Fry, L. J., in Munster v. Lamb, 11 Q. B. D. 588, 607 (Eng.).

[28] Scott v. Stansfield, L. R. 3 Ex. 220 (Eng.), LEADING ILLUSTRATIVE CASES; Hodson v. Pare, (1899) 1 Q. B. 455 (Eng.).

[29] Sheppard v. Bryant, 191 Mass. 491.

as relevant to the prayer of the petition and confined to members of the legislature;[30] to statements by the defendant in the course of his military duty as an officer, made as a report to a superior officer and reflecting on the plaintiff in his military capacity;[31] to statements in the proceedings of the executive department of the government.[32]

In England, this absolute privilege extends also to the counsel engaged in conducting proceedings before a court, to the witnesses, and to the parties.[33] In America, the rule has been qualified as respects counsel, witnesses, and parties; their statements are protected only when they are pertinent and material to the controversy—"in order that the protection given to individuals, in the interest of an efficient administration of justice, may not be abused as a cloak from beneath which to gratify private malice."[34]

Conditional privilege. If the defendant's statement is absolutely privileged, neither its falsity, nor the bad faith of the defamer, is a subject of inquiry. "Granting that the defendant knew his statement was absolutely false, and that he took advantage of his position from the meanest of motives, he still goes scott free."[35] But if the statement is condi-

[30] Lake v. King, 1 Wms. Saund. 131 b. (Eng.); Flint v. Pike, 4 B. & C. 423 (Eng.); Bigelow, Torts (8th ed.), p. 306.

[31] Dawkins v. Lord Paulet, 9 B. & S. 768 (Eng.).

[32] Spalding v. Vilas, 161 U. S. 483; Chatterton v. Secretary of State, 2 Q. B. 189 (Eng.).

[33] Munster v. Lamb, 11 Q. B. D. 588 (Eng.) (solicitor); Hodgson v. Scarlett, 1 B. & Ald. 232 (Eng.) (counsel); Seamen v. Netherclift, 2 C. P. D. 53 (Eng.) (witnesses); Bens v. Smith, 18 C. B. 126 (Eng.).

[34] Lord, J., in McLaughlin v. Cowley, 127 Mass. 316.

[35] Burdick, Law of Torts (2nd ed.), p. 322.

tionally privileged, the defendant, although he pleads and proves the existence of his condition, will fail if the plaintiff can show that it was published maliciously. In cases of conditional privilege, the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. "He is not entitled to the protection if he uses the occasion for some indirect and wrong motive."[36]

This "indirect or wrong motive" commonly takes the form of "malice." But by this is not meant the implied malice, or "pleading malice," which is still customarily alleged by the plaintiff in his first pleading, in an action for defamation; it is malice in fact; i. e., a wrong motive on the part of the defendant.[37] There are several classes of these conditionally privileged communications.

(a) *Statements made in the performance of some social or moral duty.* When the defamatory statement was made in the discharge of some public or private duty there is no liability in the absence of proof of actual malice. "That duty need not be, and indeed seldom is, one enforcible at law; it is sufficient that by the moral standard of right conduct prevalent in the community the defendant lay under an obligation to say what he did."[38] In such cases the law affords a qualified defense, depending upon the absence of actual malice.[39] Nor is this privilege restricted within narrow limits. "If fairly war-

[36] Per Brett, L. J., in Clark v. Molyneux, 3 Q. B. D. 237, 246 (Eng.).
[37] Clark v. Molyneux, 3 Q. B. D. 237 (Eng.).
[38] Salmond, Law of Torts (2nd ed.), p. 427.
[39] Parke, B., in Toogood v. Spyring, 1 C. M. & R. 181 (Eng.).

ranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society."[40]

Thus, an accusation of crime is conditionally privileged if made in answer to a question by an officer of the law with a view to detecting the offender.[41] A statement by D, a business man, that P is insolvent is conditionally privileged if made in answer to an inquiry by one who proposes to do business with P.[42] So an employer's answer to a question respecting the character of a former servant made by any person who proposes to engage him, is conditionally privileged.[43]

But if the communication is "officious," that is, volunteered by the defendant without inquiry from one possessing a lawful interest, it is unprivileged unless there is some special confidential relation between the parties creating a duty to speak without inquiry. For instance, D, the mayor of the town, had as his guest one M, with whom was his servant, P. The police reported to D that a theft had been committed in a certain hotel, and that P was suspected. D without inquiry told M of the report and

[40] Per Brett, J., in Toogood v. Spyring, 1 C. M. & R. 181 (Eng.).

[41] Kine v. Sewell, 3 M. & W. 297 (Eng.); Dale v. Harris, 109 Mass. 193.

[42] Jackson v. Hopperton, 16 C. B. (N. S.) 829 (Eng.). An important qualification of this has recently been made by the Judicial Committee of the Privy Council, the highest court of the British Empire, in MacIntosh v. Dun (1908), A. C. 390 (Eng.). It was held here that the privilege did not extend to communications furnished on special request, if the request was itself solicited as a matter of business by the defendant. In this case the defendant was a commercial agency; the communication was to a subscriber on special request.

[43] Jackson v. Hopperton, cited in Note 42.

the suspicion. P was innocent; but it was held that D's statement to M was made in the discharge of a moral or social duty, and as such was conditionally privileged. There being no evidence of actual malice, judgment was given for the defendant.[44]

(b) *Statements in the protection of an interest.* There may be a conditional privilege of defamation even in the absence of a legal, social, or moral duty. "Every statement made with the object of protecting some interest of the writer or speaker, and reasonably necessary for such purpose, is conditionally privileged."[45]

The interest may relate to the defendant's property or to his reputation, or to the good name of his business. An employer has a sufficient interest in the honesty of his men to warn them against a former associate who was suspected of theft.[46] The interest may belong to the defendant exclusively or in common with others. A charge by any member of the public against a public official will be conditionally protected, although defamatory, if it is made to one who has authority over the official.[47]

But it must be an interest which the law can recognize; a mere friendly interest does not suffice.[48] And

[44] Stuart v. Bell, 2 Q. B. 341 (Eng.).

[45] Fraser, Law of Libel and Slander (3rd ed.), p. 135, adopted in Burdick, Law of Torts (2nd ed.), p. 330.

[46] Somerville v. Hawkins, 10 C. B. 583 (Eng.); Squires v. Wason Mfg. Co., 182 Mass. 137, 65 N. E. 32; Smith v. Smith, 73 Mich. 445, 41 N. W. 499, 3 L. R. A. 52, 16 Am. St. Rep. 594; Caldwell v. Story, 107 Ky. 10, 52 S. W. 850.

[47] Harrison v. Bush, 5 E. & B. 344 (Eng.); Purcell v. Sowler, 2 C. P. D. 215 (Eng.).

[48] The Count Joannes v. Bennett, 5 Allen 169 (Mass.), LEADING ILLUSTRATIVE CASES. But see Burdick, Torts (2nd ed.), p. 324.

it is necessary, in these cases, as in cases of privilege founded on duty, that the communication be made to one who has a corresponding interest or duty. The doctrine on the subject, said Bigelow, C. J., in 1862, "has been stated in the form of a legal rule or canon, which has been sanctioned by high judicial authority. The statement is this: A communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty to perform, is privileged, if made to a person having a corresponding interest or duty, although it contains defamatory matter, which without such privilege would be libellous and actionable. It would be difficult to state the result of judicial decisions on this subject, and of the principles on which they rest, in a more concise, accurate and intelligible form."[49]

In some cases the interest of the party making the defamatory statement is so slight that it reaches the vanishing point; and there is authority for extending the privilege to communication in the interest of the recipient alone.[50] A further extension of the privilege is found in the English doctrine that a defamatory statement by an employer is conditionally privileged, when made to one about to employ the servant, even when the statement was volunteered.[51]

(c) *Reports of public proceedings.* A newspaper

[49] The Count Joannes v. Bennett, 5 Allen 169 (Mass.), LEADING ILLUSTRATIVE CASES.

[50] Child v. Affleck, 9 B. & C. 403 (Eng.), LEADING ILLUSTRATIVE CASES.

[51] Coxhead v. Richards, 2 C. B. 569 (Eng.). Tindal's opinion has been accepted as stating the correct rule. See Stuart v. Bell, 2 Q. B. 341 (Eng.).

published a full, true, and accurate report of the proceedings of a public meeting in which the whole community had an interest. In these proceedings, and as a principal part of them, a statement which defamed P was publicly made. This defamatory statement was given in the newspaper's report, precisely as it was made, and without comment. Is the publication protected by a privilege, either absolute or conditional? Absolutely privileged it is not, at common law.[52] Neither is it conditionally privileged at common law on the mere ground that it is a full and accurate newspaper report of a public meeting in which all the community were interested.[53] "Liberty of the press," says Judge Cooley, "is not license, and newspapers have no privilege to publish falsehoods, or to defame under the guise of giving the news."[54]

But a full and accurate report of actual public legislative proceedings, or of the actual public proceedings of any court of justice, whether preliminary or final, are conditionally privileged; and the

[52] By statute in England, passed in 1888 (The "Law of Libel Amendment Act, § 3), "a fair and accurate report in any newspaper of proceedings publicly heard before any Court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged, provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter." It has been doubted whether this statute confers an absolute or only a conditional privilege.

[53] Trebby v. Transcript Publishing Co., 74 Minn. 84, 76 N. W. 961, 73 Am. St. Rep. 330. This rule has been modified by statute to some extent. See Garby v. Bennett, 166 N. Y. 392, 59 N. E. 1117. See note 52, and Law of Libel Amendment Act, § 4.

[54] Cooley, Torts (student's ed.), p. 244, referring to Fitzpatrick v. Daily States Pub. Co., 48 La. Ann. 1116, 20 So. 173; Haynes v. Clinton Printing Co., 169 Mass. 512, 48 N. E. 275; Belknap v. Ball, 83 Mich. 583, 47 N. W. 674, 21 Am. St. Rep. 622, 11 L. R. A. 72; Democrat Pub. Co. v. Jones, 83 Texas 302, 18 S. W. 652. And see Barnes v. Campbell, 59 N. H. 128.

same privilege has been extended to the quasi-judicial proceedings of semi-public organizations, such as a State Medical Society.

22. **Fair comment as a defense.**—An action for defamation will fail if the defendant can show that the statement complained of, although apparently defamatory of the plaintiff, was by way of fair comment on a matter of public interest.[55] Between this defense and that of conditional privilege[56] there is a material difference. To establish a privilege to defame, the defendant must show that he stands within a certain favored class; but the defense of fair comment is open to all.[57]

The privilege extends, not to statements of fact, which if privileged stand upon another ground,[58] but to comment upon facts. "Any matter which does not indicate with reasonable clearness that it purports to be comment and not statement of fact is not within the scope of the privilege.[59]

Within the range of comment, properly so called, the privilege is limited to matters of public interest. "Nothing is more important," said Crompton, J., in Campbell v. Spottiswoode,[60] "than that fair and full latitude of discussion shall be allowed to writers

[55] Carr v. Hood, 1 Camp. 355 (Eng.), note, LEADING ILLUSTRATIVE CASES; McQuire v. Western Morning News Co. (1903), 2 K. B. 318 (Eng.); Hunt v. Star Newspaper Co. (1908), 2 K. B. 309 (Eng.); Bearce v. Bass, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446.

[56] § 21.

[57] Campbell v. Spottiswoode, 3 B. & S. 769 (Eng.), LEADING ILLUSTRATIVE CASES.

[58] § 21.

[59] Fletcher Moulton, L. J., in Hunt v. Star Newspaper Co. (1908), 2 K. B. 318 (Eng.).

[60] 3 B. & S. 769, 778 (Eng.), LEADING ILLUSTRATIVE CASES.

upon any public matter, whether it be the conduct of public men, or the proceedings in courts of justice or in Parliament, or the publication of a scheme, or of a literary work." These "public matters" have been classified thus: (1) affairs of state, (2) administration of justice, (3) public institutions and local authorities, (4) ecclesiastical matters, (5) books, pictures, and architecture, (6) theatres, concerts and other public entertainments, (7) other appeals to the public.[61] Hard and fast limits, however, cannot be set to the extent of fair comment; the purpose of the law in permitting such a defense is a wide one, namely, to promote the public good, by enabling the people to discern right from wrong, by encouraging merit, and by exposing the charlatan and the cheat.[62]

But fair comment deals only with such things as invite public attention or call for public comment. It does not follow a public man into his private life or pry into his domestic concerns. It never attacks the individual, but only his work.[63] Accordingly an article which commented upon the work of the plaintiff but also ridiculed his private life, was held to be beyond the protection of fair comment.[64] So if a writer were to get hold of a private letter of a well-known author and publish a damnatory article on

[61] Odgers, Libel and Slander (3rd ed.), p. 46; Burdick, Law of Torts (2nd ed.), p. 332.

[62] See the remarks of Martin, J., in Triggs v. Sun Printing and Publishing Association, 179 N. Y. 144, 156; 71 N. E. 739, 103 Am. St. Rep. 841, 66 L. R. A. 612, LEADING ILLUSTRATIVE CASES.

[63] Same case.

[64] Same case; also see Campbell v. Spottiswoode, 3 B. & S. 769 (Eng.), LEADING ILLUSTRATIVE CASES.

the author's literary style and taste, as evidenced by the letter, it is probable that there would be no immunity from the ordinary law in respect of defamatory writings.[65]

On the other hand, if the defendant's statement keeps within the limits of what is offered to the public, the severity of its stricture, or its facetious style, will not destroy a claim to being fair comment. A newspaper article, criticising a public performance given by the plaintiffs as public singers and dancers, contained these statements respecting the plaintiffs: "Effie is an old jade of fifty summers, Jessie a frisky filly of forty, and Addie, the flower of the family, a capering monstrosity of thirty-five. Their long, skinny arms, equipped with talons at the extremities, swung mechanically, and anon waved frantically at the suffering audience." In an action based on these and similar statements, it was held that the plaintiffs were not entitled to a verdict unless, as against the defendant's answer of fair comment, they could show actual malice.[66]

The comment, however, must be fair. This, as a rule, is a question for the jury. They are to say whether the article, in their opinion, "goes beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question. Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether

[65] See the remarks of Collins, M. R., in Thomas v. Bradbury, Agnew & Co. (1906), 2 K. B. 627, 639 (Eng.).

[66] Cherry v. Des Moines Leader, 114 Iowa 298, 86 N. W. 323, 89 Am. St. Rep. 365.

any fair man could have made such a comment on the work. It is very easy to say what would be clearly beyond that limit; if, for instance, the writer attacked the private character of the author. It is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case."[67]

[67] Lord Esher, M. R., in Merivale v. Carson, 20 Q. B. D. 275, 280 (Eng.).

CHAPTER VI.

THE RESPONSE TO A PRIMA FACIE DEFENSE.

23. **Actual malice.**—Besides the customary responses which a plaintiff may make to an answer in confession and avoidance,[68] there are several replies which have a special relation to the subject of defamation. In some states, by statutory or constitutional provision, a showing of actual malice on the part of the defendant in the publication is sufficient to overcome a showing of the truth of the charge. But if there is no such express enactment, the plaintiff, as against a sufficient answer of the truth of the charge, has no recourse except through a denial, to put the defendant to his proof.[69] Neither has he any recourse except a denial if the defendant's answer shows sufficiently a case of absolute privilege. But where the answer shows a conditional privilege or fair comment, the plaintiff may reply that the publication was with actual malice, and if he succeeds in carrying the burden of proving actual malice in the publication, he will be entitled to judgment.[70]

[68] See subject, PLEADING IN CIVIL ACTIONS.

[69] In Larson v. Cox, 93 N. W. 1011 (Neb.), the rule is applied to slander, while the Court recognizes the constitutional abrogation of the rule in cases of libel.

[70] Somerville v. Hawkins, 10 C. B. 583, 590 (Eng.); Thomas v. Bradbury, Agnew & Co. (1906), 2 K. B. 627 (Eng.); Cherry v. Des Moines Leader, 114 Iowa 298, 86 N. W. 323.

"The proper meaning of a privileged communication," it has been said by high authority, "is only this: That the occasion on which the communication was made rebuts the inference prima facie arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made."[71] Comment which is actuated by malice cannot be deemed fair on the part of the person who makes it. Proof of malice may take a criticism that is prima facie fair outside the limits of fair comment; it is immaterial, in this case, that some one else might, without malice, have written an equally damnatory criticism.[72]

24. **Excess of privilege.**—A prima facie conditional privilege, pleaded by the defendant, may be overcome also if the plaintiff can show that the defendant used the privilege unreasonably. In this case, the defendant is liable for "excess of privilege." Thus, the defendant sent by telegram a message which might as well have been sent by letter. The message was defamatory, but the defendant claimed a privilege. Said the Court: "A communication which would be privileged if made by letter becomes unprivileged if sent through the telegraph office unreasonably, because it is necessarily communicated to all the clerks through whose hands it

[71] Baron Parke, in Wright v. Woodgate, 2 C. M. & R. 577 (Eng.), as quoted by Lord Macnaghten delivering the opinion in the Judicial Committee of the Privy Council, in Jenoure v. Delmege (1891), A. C. 73, 78 (Eng.).

[72] Thomas v. Bradbury, Agnew & Co. (1906), 2 K. B. 627 (Eng.).

passes. It is like the case of a libel contained on the back of a post card."[73]

So, when a "daily notification sheet" issued by a mercantile agency firm was sent by the defendant to all its six hundred subscribers in St. Louis, irrespective of their interest in the question of the plaintiff's credit and standing, it was held that the protection of a privileged communication was lost.[74] So, again, when a defamatory statement respecting a candidate for judge in a certain district was voluntarily published by the defendant, not only outside the district but outside the state, "thus making it known to persons who were in no way interested in the judicial election," the publication was held to have lost its privilege.[75]

But the mere fact that others than those immediately interested have been reached by the defendant's publication is not necessarily conclusive of an excess of privilege. For instance, the defendant inserted this notice in a local paper: "A young man (naming him), having left my employ and taken upon himself the privilege of collecting my bills, this is to give notice that he has nothing further to do with my business." It was held that the mere fact that the circulation of the newspaper was more extensive than the routes of the defendant's business

[73] Brett, J., in Williamson v. Freer, L. R. 9 C. P. 393, 395 (Eng.). Compare with this the opinion in Ashcroft v. Hammond, 197 N. Y. 488. Compare Western Union Telegraph Co. v. Cashman, 149 Fed. 367. And see Trebby v. Transcript Pub. Co., 74 Minn. 84, 76 N. W. 961, LEADING ILLUSTRATIVE CASES.

[74] Erber & Strickler v. Dun, 12 Fed. 526.

[75] State v. Haskins, 109 Iowa 656, 80 N. W. 1063, 47 L. R. A. 223, 77 Am. St. Rep. 560.

could not of itself defeat the defense of privilege.[76] The controlling feature in the decision is in the jury's finding that to give this notice through a local paper was reasonable. If the paper had been a metropolitan daily, the result might have been different.[77]

On this ground, it has been held also that there was no excess of privilege when a defamatory letter was dictated by a lawyer, on behalf of his client, to a clerk in the office, and was then copied in a letter-book by another clerk, for the publication to the clerks even of such a letter was necessary and usual in the discharge of a lawyer's duty to his client.[78] Nor is there an excess if the defamatory letter is dictated in the ordinary course of business by a corporation through one of its officers to a stenographer.[79] "Typewriters, human and mechanical, may now perhaps be said to be reasonably necessary and useful for ordinary business purposes."[80]

But there is authority for finding an excess of privilege if the use of a stenographer or copying clerk in sending the defamatory letter was not reasonably necessary in the ordinary course of the de-

[76] Hatch v. Lane, 105 Mass. 394; Fahr v. Hayes, 50 N. J. Law 275, 13 Atl. 261; Phillips v. Bradshaw, 167 Ala. 199, 52 So. 662; Toogood v. Spyring, 1 C. M. R. 181 (Eng.).

[77] State v. Haskins, 109 Iowa 656, 80 N. W. 1063, 47 L. R. A. 223, 77 Am. St. Rep. 560.

[78] Boxsius v. Goblet Freres (1894), 1 Q. B. 842 (Eng.). That there was a publication in communicating the contents to the clerks, see State v. McIntire, 20 S. E. 721 (N. C.); Kiene v. Ruff, 1 Iowa 482.

[79] Owen v. Ogilvie Pub. Co., 53 N. Y. Supp. 1033, 32 App. Div. 465; Edmondson v. Birch & Co. (1907), 1 K. B. 371 (Eng.); Bohlinger v. Germania Life Ins. Co., 140 S. W. 257, 259 (Ark.).

[80] Moss, C. J., in Puterbaugh v. Gold Medal Furniture Co., 7 Ont. L. R. 582.

fendant's business.[81] For instance, a merchant dictated to a clerk a libellous statement about a customer, the clerk took it down and gave it to another clerk in the office to copy. It was held to be excess of privilege, "for it does not fall within the ordinary business of a merchant to write such defamatory statements, and if he does so it is not reasonably necessary, as he is doing a thing not in the ordinary course of his business, that he should cause the statement to be copied by a clerk in his office."[82]

[81] See Pullman v. Hill & Co. (1891), 1 Q. B. 524 (Eng.); Gambrill v. Schooley, 93 Md. 48, 48 Atl. 730, 52 L. R. A. 87, 86 Am. St. Rep. 414; Puterbaugh v. Gold Medal Furniture Co., 7 Ont. Law Rep. 582.

[82] Pullman v. Hill & Co. (1891), 1 Q. B. 524 (Eng.), as explained by Lord Esher in Boxsius v. Goblet Freres (1894), 1 Q. B. 842, 844 (Eng.). But in view of the later decisions the authority of Pullman v. Hill & Co. is open to serious question.

CHAPTER VII.

JUDGMENT AND DAMAGES.

25. **Scope of the judgment in defamatory actions.** —Regularly, the result of an action for defamation, if the plaintiff recovers, is a judgment for damages. In England, by virtue of statutory changes, there may be also an injunction restraining the repetition or continuation of the publication.[83] But in the United States "there is judicial unanimity that an injunction will not issue to restrain the threatened publication of a libel."[84] The result is sometimes a practical denial of justice. In a recent case a corporation asked a Federal Court to enjoin a rival corporation from making, for the purpose of injuring or destroying the credit and financial standing or business of the complainant, any statement to the effect that the plaintiff "is insolvent, or in great financial straits or on the verge of bankruptcy." The court refused to grant the injunction and remarked as follows:

"The difficulties in the way of affording such relief are insurmountable. They grow alike out of constitutional provisions, and want of jurisdiction in the court of equity. If the statements complained

[83] Saxby v. Easterbrook (1878), 3 C. P. D. 339 (Eng.); Thorley's Cattle Food Co. v. Massam (1880), 14 Ch. D. 763 (Eng.); Jenks, Digest Eng. Civ. Law, p. 500.

[84] Burdick, Law of Torts, p. 512. And see article on "Injunction," 22 Cyc. 900, and cases there cited.

of are not false, defendant has a right to make use of them in getting business for itself. It affirms that these statements are true, while complainant insists they are maliciously false. Defendant has a right to have the truth or falsity of the issue determined by a jury trial as at common law. That it cannot get in a court of equity. A person cannot be enjoined from doing any act unless it is fairly apparent the act is wrongful, or the person sought to be enjoined has no right to do that act. How can a court of equity be satisfied where the right lays in the matter of the alleged false statements? It cannot try the question for itself, or determine the right in advance of the law court. Again, the Constitution forbids any law 'to curtail or restrain the liberty of speech or of the press,' and declares that: 'Any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.' Const. Ala. 1901, art. 1, § 4.

"Neither a court of equity, nor any other department of government, can set up a censorship in advance over such matters, and prevent a person from exercising this constitutional right. He has the right to publish, if he chooses to take the consequences. After he has spoken or written falsely, the criminal law can punish him, and the civil courts amerce him in damages. That such redress may not be adequate in all cases, and in some cannot be, is quite apparent; but the remedies named are all that the Constitution permits any court to employ against slanders upon a man's credit and business standing. The court cannot go outside of the Constitution, or

hold that to be an inadequate remedy which the Constitution has declared to be the sole remedy. The wrongs and injury, which often occur from lack of preventive means to suppress slander, are parts of the price which the people, by their organic law, have declared it is better to pay, than to encounter the evils which might result if the courts were allowed to take the alleged slanderer or libeler by the throat, in advance. It is bootless now, to inquire whether the courts, which first dealt with this matter, did not unduly extend the privileges the constitutional provision intended to secure, by denying all power to deal in advance with the emanation of slander and libel by one private person upon another, where the only purpose of uttering them is to acquire personal gain, by wrongfully and wantonly aspersing a fellow man's reputation and business standing. However that may be, it was the law in England until changed by statute, and is the settled doctrine in this country, that a court has no such power."[85]

26. **Damages.**—The damages awarded a successful plaintiff in an action for defamation are normally "compensatory" damages. There may be a departure from this in two directions,—the damages may be "nominal," or in some cases they may be "punitory," or "exemplary." The differences here belong in the main to the general doctrine of Damages and will be found elsewhere in this work.[86] It

[85] Jones, D. J., in Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co. (1909), 171 Fed. Rep. 553, 556.

[86] See subject, DAMAGES.

should be observed, however, that in defamation actions the amount of the damage rests to a peculiar degree in the discretion of the jury. In actions for libel and in cases of slander per se,[87] the plaintiff "need only lay before the jury the words or writing of which he complains and leave them to say to what amount of compensation he is entitled from the mere fact of such imputation having been made."[88] Thus, in a suit for slander in which the defendant suffered a default judgment and the plaintiff offered no evidence of special damage, it was held that a verdict for £40 should not be disturbed.[89]

In estimating compensatory damages, the jury may consider the plaintiff's loss of reputation, his shame and mortification, and injury to his feelings. Such damages may be awarded without having been specifically pleaded or proved. They are known as "general" damages. In addition, the jury, in awarding compensatory damages, may give "special" damages, when the plaintiff alleges and proves actual pecuniary loss as the proximate result of the defamatory charge. But courts have always exercised the right of revising the amount of damages allowed, when satisfied either that the sum awarded was perversely excessive or was the result of some gross error on a matter of principle, or that the jury misconceived the case, or were influenced by undue motives.[90]

[87] See § 8.
[88] Clerk & Lindsell, Torts, p. 618.
[89] Tripp v. Thomas, (1824) 3 B. & C. 427 (Eng.).
[90] Hall, C. J., in Hassett v. Carroll, 81 Atl. 1013, 1020.

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Editions: The editions of the text-books referred to in the footnotes of this article are as follows: *Burdick* on Torts, 2nd ed. (1908); *Clerk & Lindsell,* Law of Torts, 4th London ed., with Canadian Notes (1906); *Cooley* on Torts, (students' ed.) (1907); *Jaggard,* Law of Torts, 1st ed. (1895); *Salmond,* Jurisprudence, 3rd ed. (1910); *Salmond,* Law of Torts, 2nd ed. (1910).

LAW OF TORTS

PART VI

MALICIOUS PROSECUTION

BY

JOHN CHARLES TOWNES, LL.D.*

1. **Introduction.**—The purpose of all municipal law is to protect society and individuals in their just rights. The purpose of tort law is to protect individuals in such of their rights as are approved by the sovereign, irrespective of the consent or agreement of the persons owing the duties correlative thereto. In most instances, in determining whether or not such a right has been violated, the law looks only to the conduct of the alleged wrongdoer, without regard to the motive actuating the conduct. In some instances, however, from considerations of public policy, this rule is disregarded, and conduct is declared tortious and actionable only when prompted by evil motive. In these exceptional cases the improper intent is as much an essential part of the tort as the conduct induced by it.

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Malicious prosecution falls into this exceptional class. The public policy requiring this is easily found. Society cannot be protected without courts, which are the great conservative agencies in and through which the disputes and controversies of men are adjusted. It is essential that these tribunals shall be open to all persons who, in good faith, believe they have grievances against their neighbors, or who in good faith believe that the criminal law has been violated. To adopt a policy which would make every unsuccessful plaintiff in a civil case, or every witness for the state in a criminal case, liable in damages to the defendant therein, whenever the plaintiff in the case failed to obtain judgment, would make litigation so hazardous that men would fear to resort to it.

On the other hand, to adopt a rule to the effect that liability should never attach to the wrongful bringing of a suit, no matter how outrageous and unjust its institution may have been, would be to make the courts instruments of oppression, and means of gratifying spite and hatred, without any individual responsibility.

The law has, therefore, taken hold of the matter, and established certain rules by which to fix liability for the improper institution and maintenance of actions in the courts. Among these is a rule that no such proceeding shall subject the person instituting it to liability for damages, unless he was actuated by malice. Malicious intent is not the only essential to liability, but it is so important an element of this tort that it has been incorporated in its

name. And a suit leading to liability for damage is known as a malicious prosecution.[1]

2. **Definition.**—A malicious prosecution is a judicial proceeding, instituted without probable cause and with malice, which seriously jeopardizes or actually violates the personal liberty of the defendant therein, or which invades his rights to use, possess or enjoy his property, and which terminates favorably to the defendant.

The basic idea is the putting in operation the machinery of the law against an innocent person maliciously and without probable cause for so doing.

The elements of the tort are:

1. The institution and maintenance
2. Of a judicial proceeding
3. Without probable cause,
4. With malice,
5. Actual interference with the rights of the defendant in the proceeding,
6. Termination of the suit in favor of defendant,
7. Directly resulting damage.[2]

3. **The institution and maintenance of the proceeding.**—The proceeding may be either civil or criminal. In civil cases the institution of the suit is the act of the plaintiff. He and all persons actuated by his evil motive, and knowing the unfounded nature of the suit, who coöperate with him or aid or abet him in its institution are responsible.[3]

[1] Ball v. Rawles, 93 Cal. 222, 28 Pac. 937.

[2] Wheeler v. Nesbitt, 24 How. 544 (N. S.), 16 L. Ed. 765; Stewart v. Sonneborn, 98 U. S. 187, 25 L. Ed. 116.

[3] "Actions for malicious prosecution are brought more commonly for wrongful criminal prosecutions. For civil suits instituted of malice and

In criminal cases a private individual can rarely actually institute the suit, as such proceedings must in almost all instances be begun by some proper legal officer. Those persons who actually bring about the prosecution wrongfully are regarded as having instituted the prosecution. Frequently nice questions arise as to who is the direct cause of the prosecution,—the complaining witness or the officer of the law. No general rule can be announced, but each case must be determined by its particular facts. If a witness voluntarily makes a complaint, written or oral, as the case may be, to the law officer, intending and desiring thereby to induce the prosecution, he is ordinarily regarded as responsible for the action. His responsibility, however, goes no further than his conduct, justly interpreted, warrants. If he makes a full and fair statement of all the facts

without probable cause the American law however gives a right of action, while the tendency of the English courts has gradually been against giving redress. It is there given however in cases of action involving charges of scandal to reputation or the possible loss of liberty, such as proceedings in bankruptcy against a trader, or in petitions to wind up a company. * * * Legislation in England * * * has been passed entitling the successful party in a civil cause to costs; the effect of which, after much fluctuation of opinion, is finally held to be that all right of action for a false and malicious civil suit, not importing defamation, is taken away. The right to costs is deemed to satisfy any damage the successful party may have sustained.

In this country the law is in a state of confusion. Some of our courts hold, with the courts of England, that the right of costs takes the place of any right of action for the suit; others hold the contrary, but on varying grounds. These latter authorities take the position that costs can seldom make good the loss sustained in defending an unfounded suit; but they do not agree as to what the supposed loss as a ground of action consists. It is sometimes said that it may consist in the expense, in one form or another, to which the plaintiff was put; sometimes it is found in the arrest of the party or in the attachment of his property, where such a thing took place." —Bigelow, Torts (8th ed.), pp. 205, 224.

known to him, and, according to some authorities, of those which he might have ascertained by reasonable diligence as well, and the officer erroneously concludes that these facts constitute a violation of the law and bases a prosecution thereon, the witness will not be responsible for the legal mistake of the officer. If, however, the witness makes false statements to the officer, and the officer's legal conclusions thereupon are correct, the witness will be regarded as the party instituting the suit.

If a witness maliciously makes a false statement to an officer, intending thereby to induce the officer to prefer a criminal charge against a person, and the officer, induced by such statement, institutes the prosecution in a court of general criminal jurisdiction, the witness cannot escape liability by showing that the court held that the facts did not constitute an offense.[4]

On the other hand, if a witness is subpœnaed by an officer, and brought before him, and gives his testimony in obedience to the summons, the former is not ordinarily regarded as responsible. These facts, however, are not conclusive. A seemingly voluntary witness may in fact be acting under a sense of legal duty and a desire to assist justice, while one anxious to institute a proceeding against his neighbor with malice may cause himself to be subpœnaed.

4. **Judicial proceeding.**—The proceeding, to come within the legal conception of a malicious prosecution, must be a judicial one. Prosecutions or com-

[4] Thaule v. Krekeler, 81 N. Y. 428; Dennis v. Ryan, 65 N. Y. 385; Burnham v. Collateral Loan Co., 179 Mass. 274, 60 N. E. 617; Tangney v. Sullivan, 163 Mass. 166, 39 N. E. 799.

plaints before boards of public officers, or other public agents not exercising judicial functions, however wrongful and injurious they may be, are not included within the definition of this particular tort.[5]

A judicial proceeding is one carried on before a court or magistrate, for the purpose of investigating and adjudging the legal rights and liabilities of the parties to such proceeding between or among themselves. The power of such a tribunal may extend to the final adjudication of the rights of the parties and their enforcement as adjudged; or it may lack the power of final determination of the matter before it, as in the case of committing magistrates, who have only the authority to determine the probability of the guilt of the accused, and to detain, admit to bail, or discharge him, as the facts may appear.

The question very frequently arises whether a proceeding instituted in a particular court which has no jurisdiction of the matter, is a judicial proceeding. There is a good deal of confusion in the answers given by the different courts. A great deal, if not all, of this confusion can be avoided if there is kept in mind the distinction between potential and active jurisdiction. Potential jurisdiction is the full authority conferred by law upon a particular court—the scope of its authority as an agency of the sovereign. Within the limit of this jurisdiction, the court may exercise judicial function. Outside of these limits it has no legal power. Potential jurisdiction is not infrequently called jurisdiction over the subject matter, though the latter expression is not nearly so

[5] Bodwell v. Osgood, 3 Pick. 379 (Mass.).

accurate. This potential jurisdiction lies dormant and accomplishes nothing until called into exercise in some particular case embraced within it. It then comes into actual exercise, and the power thus put forth in hearing and determining the issues between the litigating parties, may be properly designated as its active jurisdiction.

Though a given matter may be within the scope of a court's authority—potential jurisdiction—it may be presented to it in an irregular or inadequate way. The variations in the irregularity are very great, extending from immaterial matters of form to the most important matters of substance. Whether or not the particular manner in which the exercise of jurisdiction is invoked will be sufficient really to call forth its exercise in any given case will depend upon the particular facts and upon the law of procedure in the particular court. If the method is so contrary to law that it does not really call forth the exercise of any judicial power, the proceeding cannot be rightfully held to be a judicial one. If, however, the method is such that it does call forth the exercise of judicial power, then the proceeding is within the jurisdiction of the court, and, however irregular it may be, is the exercise of judicial function.

Another matter to be taken into account in many of these cases is the doctrine of estoppel, which, stated briefly, is this: If one person has induced or compelled another to act upon a given state of facts as true, the former cannot thereafter deny the existence of such state of facts, whatever the real condition may be. Applied to the matter in hand, this

means that in case a person has prosecuted another in a given tribunal and put him to the expense, inconvenience and injury of a trial before such tribunal, he cannot thereafter deny that the tribunal which he has selected had the power to perform the act which he has induced it to perform.

It seems to be settled, both upon principle and by the decided weight of authority, that a proceeding instituted in a court which has no potential jurisdiction over the matter submitted to it cannot properly be regarded as a judicial prosecution.[6]

It is held by some courts that a prosecution, based upon facts which show conclusively and affirmatively that no criminal offense has been committed, because the facts set out could under no interpretation or method of pleading constitute a crime, comes within the principle now being considered, and will not support an action for malicious prosecution.[7]

These cases must be distinguished from those in which there is an imperfect statement of facts which do constitute a violation of criminal law. Such irregularities do not materially affect the jurisdiction of the court, and proceedings in which they occur are held to be judicial.[8]

Very great irregularities are frequently overlooked in cases raising serious questions as to jurisdiction on the doctrine of estoppel.[9]

[6] Collum v. Turner, 102 Ga. 534, 27 S. E. 680; Bixby v. Brundige, 68 Mass. 129; Painter v. Ives, 4 Nebr. 122; Apgar v. Woolston, 43 N. J. L. 57. Contra: Morris v. Scott, 21 Wend. 281 (N. Y.).

[7] Satilla Mfg. Co. v. Cason, 98 Ga. 14, 25 S. E. 909.

[8] Wagstaff v. Schippel, 27 Kan. 450.

[9] Stone v. Stevens, 12 Conn. 219; Stubbs v. Mulholland, 168 Mo. 47, 67 S. W. 650.

In the case of Sutor v. Wood,[10] Sutor made complaint before a United States Commissioner, charging Wood with unlawfully opening a letter addressed to Sutor. The Commissioner forwarded all papers to the United States Circuit Court, and the district attorney, instead of presenting the matter to the Grand Jury for indictment, filed an information. The case was tried on the information and Wood was acquitted.

Wood then brought suit against Sutor for the malicious prosecution of the case. The Supreme Court of the United States in the meantime had decided that this offense could be prosecuted only by indictment. Sutor interposed as a defense to the damage suit the contention that the proceeding before the United States Circuit Court upon information was without jurisdiction and void, and consequently it could not be called a judicial proceeding. After a careful consideration of the point and a review of a number of authorities, it was held by the Supreme Court of Texas that the defense was not available to Sutor. It was declared that, according to the weight of authority, as the court had potential jurisdiction over the subject matter, the proceeding was a judicial one. It was further decided that even though the proceeding were not in fact a judicial one, Sutor was estopped from setting this up as a defense.

5. **Want of probable cause.**—It is universally agreed that the prosecution must be instituted with-

[10] Wood v. Sutor, 70 Texas 343, 8 S. W. 51; Sutor v. Wood, 76 Texas 403, 13 S. W. 321.

out probable cause. No degree of malice will sustain a charge of malicious prosecution if the party instituting the proceeding had probable cause to believe, and did believe, the defendant therein to be guilty. Probable cause has been defined as "the existence of such facts and circumstances as would excite the belief in a reasonable mind acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted."[11]

This definition has met with very general approval. It is entirely satisfactory, with the explanation that the word "knowledge" used with reference to the facts upon which the prosecutor acted, must be taken to include not only the facts actually known to him but such also as could have been ascertained by reasonable inquiry.[12]

Ordinarily the existence or non-existence of probable cause is to be determined by the facts as they were known, or could reasonably have been ascertained, at the time the prosecution was instituted: if the party sought to be held acted upon those facts in good faith, he is not liable. On the other hand, if those facts were insufficient to constitute probable cause, and the defendant in the prosecution was in fact innocent and is shown so to be on the trial of the action for damages, the defendant in this action cannot relieve himself by showing other incriminating facts developed between the date on which he

[11] Wheeler v. Nesbitt, 24 How. 544 (N. S.), 16 L. Ed. 765; Carl v. Ayers, 53 N. Y. 14; Stubbs v. Mulholland, 168 Mo. 47, 67 S. W. 650.

[12] Hill v. Palm, 38 Mo. 13; Sharpe v. Johnston, 59 Mo. 557; Stubbs v. Mulholland, 168 Mo. 47, 67 S. W. 650.

instituted prosecution and the date of the innocent defendant's acquittal.[13]

The effect of the judgment in the case claimed to have been maliciously instituted, upon the question of probable cause differs under different conditions. If the court in which such judgment was rendered is one having final jurisdiction and the defendant is finally convicted, or has judgment rendered against him, such judgment will be conclusive as to probable cause. If the defendant in a criminal prosecution was convicted, but this judgment was later set aside in the trial court or appealed from and reversed, and the defendant has been thereafter acquitted, the weight of authority is that the original judgment established the existence of probable cause unless it was procured by perjury, or fraud, or other improper conduct on the part of the prosecutor.[14] Other cases hold such convictions to be only prima facie evidence of probable cause subject to rebuttal. It may be that the rebuttal testimony referred to would be limited by these courts to proof of perjury, fraud or misconduct in procuring the judgment.[15]

Absence of probable cause is absolutely essential to a malicious prosecution. No matter how much or what kind of malice may actuate the prosecutor, if he has probable and reasonable cause to believe the defendant guilty, and does so believe, he is justi-

[13] Galloway v. Stewart, 49 Ind. 156; Thompson v. Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554.

[14] Crescent City, etc., Co. v. Butchers' Union, etc., 120 U. S. 141, 30 L. Ed. 614, 7 Sup. Ct. Rep. 472; Holliday v. Holliday, 123 Cal. 26, 55 Pac. 703; Price v. Stanley, 128 N. C. 38, 38 S. E. 33.

[15] Nehr v. Dobbs, 47 Nebr. 863, 66 N. W. 864; Knight v. I. & G. N. Ry. Co., 61 Fed. 87, 9 C. C. A. 376.

fied in taking the matter before the court. Malice cannot justify an improper prosecution, neither can it make unlawful the prosecution begun for the purpose of bringing to punishment one whom the facts as known to the prosecutor reasonably show to be guilty.[16]

6. **Malice.**—The next essential element in malicious prosecution is malice. The law recognizes different kinds and degrees of malice, and many definitions of the term have been attempted. Perhaps as good a one as can be given in this connection is, "a state of mind which prompts one wilfully to do an unlawful act to the injury of another." This is substantially the idea announced by Mr. Greenleaf in the words so often quoted,—"Any unlawful act done wilfully and purposely to the injury of another, is, as against that person, malicious."[17]

Malice includes spite, ill-will, hatred, and all forms of affirmative desire to injure, but in legal contemplation it includes much more than these. If one purposely does an act which he is conscious is unlawful and wrongful and which must result in legal hurt to another, this will make out a charge of malice against him. Malice may be proven also by showing that the prosecutor instituted a criminal case, not for the purpose of vindicating justice or enforcing the criminal law, but to gain personal advantage to himself, such as forcing the payment of a debt or compelling the defendant to relinquish some legal right.[18]

[16] Wheeler v. Nesbitt, 24 How. 544 (N. S.), 16 L. Ed. 765; Thompson v. Beacon Valley Rubber Co., 56 Conn. 493; Hamilton v. Smith, 39 Mich. 222.

[17] Greenleaf, Evidence, vol. II, § 452; Ramsay v. Arrott, 64 Texas 320.

[18] Torsch v. Dell, 88 Md. 459, 41 Atl. 903; Gabel v. Weisensee, 49 Texas 131.

Malicious motive is absolutely essential to the existence of this tort. Ordinarily evil motive is not necessary to make wrongful and injurious conduct a tort. The cases in which evil motive is essential are usually, if not always, those in which the act complained of as wrongful is primarily unlawful in its nature but from considerations of public policy is licensed when committed with lawful motive. When evil motive actuates the conduct, the license is withdrawn and the act goes back to its original state of unlawfulness.

Applying these general doctrines to malicious prosecution, we find that every time a plaintiff in a civil suit, or the state in a criminal action, fails to maintain the case and final judgment goes for the defendant, this is an authoritative adjudication that the suit was wrongfully brought. Such conduct, strictly considered, should be unlawful. But, from considerations of public policy, this unlawful interference with the rights of the defendant, occasioned by an honest though mistaken belief that the action was well founded, is excused, or licensed, by law, and the successful defendant can maintain no further action on account of it. To allow such action would lead to endless litigation. Each time a plaintiff should be unsuccessful the defendant could sue him for damages, and each time a criminal prosecution failed the prosecuting witness would be subject to a like suit. This the law cannot tolerate. To avoid such conditions, it licenses the wrong of the unsuccessful suit unless it be prompted by evil motive. Hence the rule is universal that to maintain an action

for malicious prosecution, in every instance malice must be shown.

Malice may be proven in these cases by the same character of testimony as in any other. It is frequently said that malice may be implied from lack of probable cause. This is not the statement of a legal presumption, but merely an expression of what the jury is privileged to do if it sees fit.[19]

7. **Interference with rights.**—Litigation cannot be conducted without inconvenience, loss of time and expense to all parties connected therewith. The very general rule is that such ordinary results will not be taken into account, nor will the defendant be compensated therefor. According to the weight of authority, before he can sustain an action for malicious prosecution he must be able to show special injury beyond these ordinary results.

There are some old cases which, in their language, indicate that it is not actually necessary to interfere with the defendant's right of personal liberty in criminal cases, or with his liberty or property rights in civil suits. The better opinion and the trend of the later cases seems to be that if there be no actual invasion of any right, personal or property, there can be no recovery.

In criminal cases the arrest of the defendant is always a sufficient invasion of his rights to support an action. Arrest does not necessarily mean the application of physical force. If an officer has a writ for the arrest of a defendant, and advises him of that

[19] Merriam v. Mitchell, 13 Maine 439; Lunsford v. Dietrich, 86 Ala. 250, 5 So. 461; Sharpe v. Johnston, 59 Mo. 557; Roy v. Goings, 112 Ill. 656.

fact, and demands a bond, the recognition by the defendant of the officer's authority over him and the giving of a bond will be sufficient.

In civil cases where the defendant is arrested under process the rules are the same as in criminal actions.

If there is no interference with the defendant's person, according to the weight of authority, there must be an actual seizure of some property belonging to the defendant in the action or an appreciable interference with his enjoyment of some thing. Bringing a civil suit and making affidavit and giving bond to procure an attachment, and getting out the writ, if the papers are returned by instruction of plaintiff before levy, it has been held, will not maintain an action for malicious prosecution. This is held even when the defendant in the proceeding is a merchant, and he claims that his reputation and standing in his business are injured by the affidavit for attachment.[20]

If the proceeding is an unusual one which contemplates interference with the liberty and rights of the defendant, or the custody and control of all his property, as an action instituted to declare the defendant insane, or a proceeding in bankruptcy, the courts usually hold that no actual taking into custody of the person or seizure of the property is necessary.[21]

It is also held that where one person without

[20] Johnson v. King & Davidson, 64 Texas 226; Smith v. Michigan Buggy Co., 175 Ill. 619, 51 N. E. 569; Mayer v. Walter, 64 Pa. St. 283; Smith v. Hintrager, 67 Iowa 109. Contra: Wade v. National Bank, 114 Fed. 377; Lipscomb v. Schofner, 96 Tenn. 112, 33 S. W. 818.

[21] Lockenour v. Sides, 57 Ind. 360.

authority to do so institutes or attempts to maintain litigation in behalf of another, without the latter's approval or consent, such unlawful interference in matters with which he has no concern will make him liable to the person sued for all damages resulting from his unwarranted action. This is based upon the idea that such person is not really using the court for the purposes for which it is maintained.

8. **Termination of the proceeding.**—The proceeding which it is claimed was a malicious prosecution must be finally ended before a suit for the damages occasioned by it can be brought. Ordinarily there is no difficulty in determining whether or not the prosecution is at an end. A judgment of the court in which the proceeding was instituted usually settles this issue. Sometimes, however, the question is a difficult one. The difficulty arises on the point whether the termination of the particular prosecution instituted by the person sought to be held liable is sufficient, or whether all liability to prosecution which may grow out of the conduct of the original instigator must have terminated.

These difficulties occur principally in criminal cases and in two connections. First, where the prosecution was begun and dismissed without final trial, and the time for reinstating the dismissed proceeding has not passed. Second, where prosecution was instituted before a committing magistrate, and he has discharged the prisoner, but in pursuance of his legal duty the magistrate has transmitted the papers in the case, including the prosecutor's complaint and evidence, to the grand jury. The rule seems to be

that in either of these cases the action for malicious prosecution may be begun before the lapse of time necessary to cut off the further continuation of the action, but that in so doing the plaintiff in the damage suit acts at his own risk. If in either case the prosecution be revived, based upon the original act of the prosecutor, the suit for damages must either abate or be stayed until the criminal prosecution is at an end. If, however, no such revival occurs, the action for damages may proceed and the dismissal or discharge will be a sufficient determination of the prosecution.[22]

If a third person, not influenced by or coöperating with the former prosecutor, should bring another prosecution for the same offense, this would not affect the claimant's right to maintain his suit for damages against the person who had done him the first wrong.

There are two legal reasons for requiring the termination of the alleged malicious prosecution before beginning the suit for damage. The first is that the judgment of acquittal is necessary to negative the idea of probable cause, and the second, that it is against the policy of the law to have two suits between the same parties, based on substantially the same facts, pending either in the same court or in different courts of concurrent jurisdiction. The latter reason does not apply in criminal cases.

[22] Cardival v. Smith, 109 Mass. 158; Graves v. Dawson, 130 Mass. 78; Woodman v. Prescott, 66 N. H. 375; Lowe v. Wartman, 47 N. J. L. 413; Apgar v. Woolston, 43 N. J. L. 57; Rider v. Kite, 61 N. J. L. 8, 38 Atl. 754; Marks v. Townsend, 97 N. Y. 590; Hartshorn v. Smith, 104 Ga. 235, 30 S. E. 666; Southern Car and Foundry Co. v. Adams, 131 Ala. 147, 32 So. 503.

9. **Damages recoverable.**—Damage is a sum of money allowed by law to the plaintiff as compensation for wrong done him by the defendant, or as a vindication of his right against the defendant. Damages are of two kinds: actual or compensatory, which are allowed in order to repay or reimburse the injured party for pecuniary loss sustained by him as a result of the defendant's wrong; and exemplary or punitive, which are intended as a punishment or example, with a view of deterring other persons from committing wrongs similar to that proven against the defendant.

The items of actual damage which may be recovered in any case for malicious prosecution depend upon the particular facts of the case. If the plaintiff in the action has been deprived of his liberty, subjected to mortification, brought into bad repute, suffered loss of time, sustained physical injury, or undergone physical or mental suffering, proper compensation may be allowed him for each of these items of hurt according to the testimony of the case. If his personal rights have not been interfered with but his property has been seized and thereby lost to him, he may recover the value of the property, or if the property has been restored, he may recover the value of its use while kept away from him and the depreciation in value occasioned by its seizure, either because of injury to the property, depreciation in price or other directly resulting hurt. Whatever doubt there may be as to the plaintiff's right to recover for injury to his reputation occasioned by malicious prosecution which did not result in inter-

ference with his person or property, there is no doubt that such damages are recoverable when they result directly from, or are accompanied by, unlawful interference with one's personal liberty or the seizure of his personal property.

Exemplary damages are never allowed except in cases in which the wrongdoers have been actuated by evil motive, or have shown such wanton and reckless disregard of the rights of others as is equivalent to evil motive. As malice is one of the elements of the tort of malicious prosecution, whenever the plaintiff is successful in his suit he can recover such damage. The amount of this damage is largely in the discretion of the jury and judge, though not absolutely so. Exemplary damage can never be recovered in cases where there is no actual damage, and when both actual and exemplary damages are recovered the exemplary damages allowed must be in reasonable proportion to the actual.

10. **To whom liability extends.**—Everyone who, with knowledge of the facts that the suit is unfounded and that the plaintiff is actuated by malice, aids and abets the plaintiff in the prosecution is responsible with the plaintiff for the damages directly resulting therefrom. There is nothing peculiar in this tort in this respect. The rules are the same as govern in determining the liability of parties to other torts so far as those coöperating together are concerned.[23]

As malice is an essential element of this tort, no

[23] Stansbury v. Fogle, 37 Md. 369; Peck v. Chouteau, 91 Mo. 138; Chambliss v. Blau, 127 Ala. 86, 28 So. 602.

one can commit it who has not sufficient mental capacity to entertain the required evil motive. Legal incapacities, such as minority or coverture, do not prevent liability where the parties have the mental capacity to entertain evil motive and in fact do so.

The ordinary rules governing the relation of constituent and substitute, as principal and agent, apply here. If the institution of the malicious prosecution was within the scope of the agent's employment, the principal will be responsible for the actual damage resulting therefrom but will not be held for exemplary damage unless he in some way personally acquiesced or participated in the evil motive. If the act was not within the scope of the agent's employment his principal is not responsible, unless he subsequently, with full knowledge of the facts ratifies the act and adopts the wrong.

Private corporations are responsible for malicious prosecution instituted by their agents or employees on the same principle and to the same extent that natural persons are. If the representative is a corporate officer, his motives will be attributed to the corporation and it will be responsible for both actual and exemplary damages. If the wrongdoer was a subordinate agent or employee, and the prosecution was instituted within the scope of his employment, the corporation will be responsible for actual damage but his malice will not be charged to the company to such an extent as to make it liable in exemplary damages.[24]

[24] Apgar v. Woolston, 43 N. J. L. 57; Southern Car and Foundry Co. v. Adams, 131 Ala. 147, 32 So. 503.

11. **Remedy.**—In those jurisdictions in which common law forms of action are recognized, remedy for malicious prosecution must be obtained by an action of trespass on the case.[25] The defendant in the action for damages has not himself committed any direct trespass upon the rights of plaintiff. The violation of such rights has been procured by him through the conduct of others acting under the forms of law. He is not guilty of a trespass *vi et armis* (by force and arms). In those jurisdictions in which the common law forms of action are not recognized, all civil suits are substantially actions of trespass on the case.

Pleadings. Plaintiff in the suit for damages must set out in his petition or declaration every fact which goes to make up his case. He must affirmatively allege that the defendant in the present action, by himself or through someone for whose conduct he is legally responsible, instituted and maintained against him, the present plaintiff, a proceeding judicial in its nature, unsupported by probable cause; that in so doing the present defendant was actuated by malice, as that term has been explained, and that during such proceeding and as a part thereof, the present defendant actually interfered with either the personal or property rights of the plaintiff, which interference directly resulted in damage to the present plaintiff; that the proceeding so instituted terminated in the present plaintiff's favor. If these facts are shown, the plaintiff's petition will be good

[25] Castro v. Uriarte, 12 Fed. 250. This opinion, though rendered in the District Court, is unusually valuable for its clearness, research and the authorities collated.

in substance. The formal requirements in each jurisdiction must be observed.

If, in the particular case, the present plaintiff had been once convicted, or bound over by a committing magistrate, it will be safer, if not necessary, for him to set up that fact, and state in his pleading the facts which rebut the prima facie effect of such action. In other words, under these conditions, the plaintiff should confess the fact which constitutes prima facie evidence of probable cause and then avoid this fact by allegation of the facts upon which he relies for that purpose.

The defendant's pleading in this action is usually quite simple, consisting of demurrers and exceptions to the petition or declaration of the plaintiff and of denials of the facts alleged by him. It is not often that any matter in confession and avoidance need be plead by him. Whenever such necessity exists, the facts should be set up under the same rules that govern similar pleadings in other cases.

Evidence. The rules of evidence in these cases are substantially the same as those which govern in other civil suits. The burden of proof is on the plaintiff, and he must introduce evidence to prove every fact necessary to sustain each point in his case before he can recover.[26]

Though the allegation of want of probable cause is negative, it must still be proved by the plaintiff.

The defendant's evidence usually consists in facts tending to disprove and destroy the effect of the

[26] Miller v. Milligan, 48 Barb. 30 (N. Y.); Walter v. Sample, 25 Pa. St. 275; Boyd v. Cross, 35 Md. 194; Legallee v. Blaisdell, 134 Mass. 473; Stubbs v. Mulholland, 168 Mo. 47, 67 S. W. 650.

plaintiff's testimony. There is, however, one matter which should be discussed to some extent. This is the effect of the advice of counsel as to the institution of the proceeding now claimed to have been malicious.

Advice of counsel. The first question to be considered is, who may be consulted for the purpose of acting on his advice. There is practical unanimity in the decisions. Not only must the counsel have a license to practice law, but he must actually be engaged in the practice and have sufficient moral and legal standing to justify a reasonable man in relying upon his judgment.[27]

To justify the admission in evidence of advice given by an attorney, it must first be shown that the party claiming the benefit of it made a full and fair statement to the attorney of all the facts of the case as known to him, or that might have been ascertained by him by the exercise of reasonable diligence, and that he believed such facts to be true and acted in good faith in taking such advice regarding the institution of the proceeding.

There is a great difference in the cases as to the effect of such advice after it has been received in evidence. Some of the decisions hold that, if the advice is obtained from a reputable attorney, upon a full and fair statement made in good faith, and the advice is acted upon in good faith, this constitutes a substantive defense and no recovery can be had. Others hold that such advice is proper to be given

[27] Murphy v. Larson, 77 Ill. 172; Roy v. Goings, 112 Ill. 656; Stubbs v. Mulholland, 168 Mo. 47, 67 S. W. 650.

in evidence before the jury, but that its effect is to be passed on by the jury and given such weight in connection with the other evidence as the jury sees fit. Some of the cases say that the advice is to be considered in determining the question of probable cause; others, in considering the question of malice; and others, again, that it may be regarded with reference to both.

In some states the distinction is made between the advice given in criminal cases by counsel sought out and employed by the party instituting the prosecution and that given by the official representative of the people,—the former not being regarded as a substantive defense, but only being received for what the jury may regard it to be worth, while the latter constitutes a defense within itself.[28]

12. **Malicious prosecution contrasted with false imprisonment.**—In conclusion, it may be well to contrast malicious prosecution with false imprisonment under judicial process. Malicious prosecution does not involve a direct trespass by the party sought to be held liable upon the person or property of him who is claiming the damage. False imprisonment always involves such a trespass. The wrong in malicious prosecution lies back of the actual trespass by the officer holding the process, and consists in the malicious and unfounded putting in operation of the machinery of the law.

False imprisonment, on the other hand, does not

[28] Hill v. Palm, 38 Mo. 13; Sharpe v. Johnston, 59 Mo. 557; Lange v. Illinois Central R. R. Co., 107 La. Ann. 687, 31 So. 1003; Sebastian v. Cheney, 86 Texas 497, 25 S. W. 691.

involve either of these ideas. False imprisonment under legal process consists in the arrest of the wrong person under process that is fair on its face, or else the arrest of a person under supposed process which is void. Malicious prosecution usually involves the seizure of the person or his property under a writ fair on its face, issued from a court having jurisdiction, commanding the very act which the officer has performed.

Notwithstanding these various differences, states of fact may arise under which the injured party would have the election to sue either for malicious prosecution or for false imprisonment. This election exists in those cases in which the court where the pleading was instituted had jurisdiction over the subject matter, but its active jurisdiction was not properly invoked. Here the injured party can take advantage of the defect in the exercise of the powers of the court and sue for false imprisonment; or he can insist that, the court having jurisdiction of such matter, having actually taken him into custody and tried him, the proceeding was a judicial one; or he may invoke the doctrine of estoppel.

Election may also exist in cases where prosecution has been instituted maliciously and without probable cause, but the process issued is so defective as not to be fair on its face. Here the party taken into custody may sue the officer making the unauthorized arrest for false imprisonment; or he may acquiesce in the arrest, submit to the trial, and after his acquittal, sue the person instituting the action for malicious prosecution.

BIBLIOGRAPHY.

The following volumes may be consulted with profit in the study of this subject: *Bigelow* on Torts (8th ed.); *Cooley,* Law of Torts (students' ed.); *Burdick,* Law of Torts; *Bishop* on Torts; and *Moore's* Civil Treatise.

For specific cases bearing on Malicious Prosecution, the student is referred to the American Digest, Volume XII, also to the American Digest, Century Edition, Volume XXXIII.

LAW OF TORTS

PART VII

INTERFERENCE WITH DOMESTIC, CONTRACTUAL AND BUSINESS RELATIONS

BY

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CHAPTER I.

INTERFERENCE WITH DOMESTIC RELATIONS.

1. **Rights incident to the domestic relations.**—The early common law recognized as a legal right the undisturbed enjoyment of the domestic relations and gave redress for at least certain invasions of such right. As incident to the domestic relations are to be included, not only conjugal rights and parental rights, but also rights of the master to the free enjoyment of the services of his servant. The relation of servant to master in our older civilization was one that had its roots in the conception of status, that is to say, of family relationship, rather than of contract. We find, then, the principles governing the relation of master and servant forming

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an interesting link between the older recognized immunity to the free enjoyment of rights resulting from domestic relations, on the one hand, and, on the other, the more recently recognized immunity to the free enjoyment of rights arising from contractual relations as well as of rights incident to the exercise of one's business or the disposal of one's labor.

2. **Husband's right to non-interference in marital relations.**—The gist of the action which a husband might maintain against one who infringed his marital rights was said to lie in his loss of consortium. The nature of the right of consortium on the part of a husband is well explained in a California case:[1] "The foundation of the husband's right of action is the wrong done him by the defendant in violating his personal rights. The husband has the right to the conjugal fellowship of his wife, to her society, her aid, and her fidelity in every conjugal relation. Any act of another by which the husband is deprived of this right, constitutes a personal wrong for which the law gives him redress in damages. Her sexual intercourse with another is an invasion of his rights, and it is immaterial whether this invasion is accomplished by force or by the consent of the wife. * * * The means by which the intercourse was effected are but incidents to increase or mitigate his damages." This right was recognized in the fullest measure in 1745,[2] and the action on the

[1] Bedan v. Turney, 99 Cal. 649, 34 Pac. 442.

[2] Winsmore v. Greenbank, Willes 577 (Eng.), (where the husband recovered for alienation of affections). The husband recovered in Yundt v. Hartrunft, 41 Ill. 9, LEADING ILLUSTRATIVE CASES (criminal conversation); Smith

case became established as the proper form of remedy. That is to say, the right to immunity from interference with marital relations became recognized as an independent right, and no longer dependent on the limitations attaching to the action of trespass.[3]

3. **Wife's right to non-interference in marital relations.**—In England it is said to be an open question whether, under any circumstances, a wife can have a right of action for deprivation of her husband's society.[4] In the case of Lynch v. Knight,[5] decided in 1861, a majority of the law lords expressed an opinion in favor of the existence of such a right of action, although the decision was against the plaintiff on the ground that the injury complained of in the particular case was too remote. In the United States, on the other hand, the prevailing view is that a wife may recover for loss of the consortium of her husband when caused by alienation of affections or criminal conversation.[6] The leading case was decided in 1889.[7] It has been held that a wife may recover for loss of consortium against a druggist who had sold morphine to the husband from the use of which he became mentally unbalanced; but where

v. City of St. Joseph, 55 Mo. 456 (negligence causing personal injuries); Mowry v. Chaney, 43 Iowa 609 (malpractice by a physician); Rogers v. Smith, 17 Ind. 323 (malicious prosecution and imprisonment of wife); Hoard v. Peck, 56 Barb. 202 (N. Y.), (sale of injurious drug to wife); Garrison v. Sun Printing & Publishing Assn., 135 N. Y. Supp. 721, LEADING ILLUSTRATIVE CASES (libel).

[3] Macfadzen v. Olivant, 6 East 387 (Eng.).

[4] Clerk & Lindsell, Torts (6th ed.), p. 245.

[5] 9 H. L. C. 577 (Eng.).

[6] Wolf v. Frank, 92 Md. 138, 48 Atl. 132, LEADING ILLUSTRATIVE CASES.

[7] Foot v. Card, 58 Conn. 1, 18 Atl. 1027.

the husband is injured physically through the negligence of the defendant and has recovered damages for the injury, the wife cannot recover, in addition, for loss of consortium.[8] A difficulty, under the older form of pleading, in effectually recognizing such a right in the wife, lay in the rule that the wife could not sue without joining her husband.

4. **Parent's right to non-interference in relations to children.**—The common law did not recognize so fully the right of the parent to the consortium of his child as it did the right of the husband to the society of his wife. The courts, when they came to feel the pressure of a public demand for redress for damage caused by the personal injury to a child or by the child's abduction or seduction, began to allow a remedy on the theory of loss of service. This idea became crystallized in the law and it grew to be necessary to allege, as the gist of the action, the loss of service.[9] Any injury to a minor child, old enough to render service, was sufficient to lay the basis for such an action. The courts did not require proof of actual service, presuming service from the relation of parent and child.[10] If the child was too young to render any service, the father could not recover.[11] But in the United States a father may recover, at least, for the necessary expense of car-

[8] Flandermeyer v. Cooper, 85 Ohio St. 327; 98 N. E. 102; Feneff v. N. Y. C. & H. R. R. Co., 203 Mass. 278, 89 N. E. 436, LEADING ILLUSTRATIVE CASES.

[9] Grinnell v. Wells, 7 Man. & Gr. 1033 (Eng.), LEADING ILLUSTRATIVE CASES.

[10] Horgan v. Pacific Mills, 158 Mass. 402, 33 N. E. 581, LEADING ILLUSTRATIVE CASES; Jones v. Brown, Peake 233.

[11] Hall v. Hollander, 4 B. & C. 660 (Eng.).

ing for and healing a child of such tender years as to be incapable of performing any service.[12]

5. **Same subject—Seduction.**—Where the wrongful act consists in the seduction of a daughter, or of a girl owing the duty of a daughter, while the theory of the loss of service is still maintained, damages are freely recoverable for consequential damage in the way of expenses, and for parental disgrace and injured feelings. In the case of minor daughters living in the household, the law implies a relation of service.[13] In the case of other dependent women, actual service must be shown before recovery can be had for seduction.[14] In case the seduction took place under the father's roof, the common law allowed the father to bring an action of trespass for breaking into and entering the house, and to recover for the seduction as a matter of aggravation.[15] In such case there was no need to allege loss of service. Where a girl, not living in her parent's house, is seduced, the person occupying the place of parent may maintain an action on like grounds and subject to the same limitations as the parent.[16]

6. **Master's right to non-interference in relations to servants.**—Actions for enticing away a servant whereby the master lost the service are of great

[12] Dennis v. Clark, 2 Cush. 347 (Mass.). See also Sykes v. Lawlor, 49 Cal. 236.

[13] Dean v. Peel, 5 East 45 (Eng.).

[14] Bennett v. Allcott, 2 T. R. 166 (Eng.)

[15] Russell v. Corn, 6 Mod. 127 (Eng.).

[16] 3 Blackstone, Comm., p. 142; Manvell v. Thomson, 2 C. & P. 303 (Eng.), 12 E. C. L. 136 (uncle); Patterson v. Wilcox, 20 U. C. C. P. 385 (brother); Ball v. Bruce, 21 Ill. 161 (guardian); Davidson v. Goodall, 18 N. H. 423 (cousin); Irwin v. Dearman, 11 East 23 (Eng.), LEADING ILLUSTRATIVE CASES (adoptive father).

antiquity. The first Statute of Laborers (23 Edw. III, c. 2), of the year 1349, made it a criminal offense for a servant to leave his service before the end of his term, or for any person to receive or keep a servant who had so left. The courts, after the passage of this act, took the statute as founding a right in the master and gave an action for knowingly enticing servants away from their employment and for knowingly harboring servants who had left their employment.[17] This statute was repealed in 1563, but the class of civil actions which had arisen under it had become firmly established and was not disturbed when the statute itself was repealed. It has been settled law, then, for centuries, that a third person who wilfully and knowingly entices a servant from his employment is liable in damages to the master or employer.[18]

[17] See the opinion of Coleridge, J., in Lumley v. Gye, 2 El. & Bl. 216 (Eng.), 75 E. C. L. 216, for a full discussion of the older authorities.

[18] Hart v. Aldridge, Cowper 54 (Eng.); Gunter v. Astor, 4 J. B. Moore 12 (Eng.); Lumley v. Gye, 2 El. & Bl. 216 (Eng.), 75 E. C. L. 216, LEADING ILLUSTRATIVE CASES; Jones & Peter v. Blocker, 43 Ga. 331; Walker v. Cronin, 107 Mass. 555; Carew v. Rutherford, 106 Mass. 1; Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475; Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780.

CHAPTER II.

INTERFERENCE WITH CONTRACTUAL RELATIONS.

7. **The right to non-interference with contractual relations—The case of Lumley v. Gye.**—It is the settled law in England and in most jurisdictions in the United States that the relation established by a contract between two persons gives rise to a legal right as against all the world, and that the invasion of such right by a stranger to the relation renders him liable for damage resulting from his interference. The leading case is Lumley v. Gye,[19] decided by the Court of Queen's Bench in 1853. The plaintiff, as manager of a theatre, had contracted with an opera singer to sing during a certain period in the plaintiff's theatre and nowhere else. The defendant, a rival theatrical manager, knowing of the existence of this contract, and, as the declaration alleged, "maliciously intending to injure the plaintiff," enticed and procured the opera singer to leave the plaintiff's employment. It was held that the plaintiff was entitled to recover. Coleridge, J., dissented, taking the view that interference with service or contract was confined by the law of England to cases of apprentices and menial servants. The majority, while holding that the right extended at least to all cases of personal service, and that the case of the opera singer fell within this category, intimated that

[19] 2 El. & Bl. 216 (Eng.), 75 E. C. L. 216, LEADING ILLUSTRATIVE CASES.

the principle involved extended to all cases of interference with contractual relations of whatever kind. The broader doctrine suggested in Lumley v. Gye was explicitly accepted by the Court of Appeal in 1881, in the case of Bowen v. Hall,[20] and confirmed and placed beyond all doubt, in 1901, in the case of Quinn v. Leathem,[21] wherein Lord Macnaghten said: "I have no hesitation in saying that I think the decision [in Lumley v. Gye] was right * * * on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference."

8. **Kinds of contracts included.**—The doctrine of Lumley v. Gye is generally followed in America. Under this doctrine an employer whose employees have been induced by a third person to break their contract of employment, may maintain an action against such third person.[22] An employee, likewise, has a right of action against a third person who maliciously procures his discharge or the breach of his contract of employment.[23] And not merely con-

[20] 6 Q. B. D. 333 (Eng.).

[21] (1901) A. C. 495 (Eng.).

[22] Employing Printers' Club v. Doctor Blosser Co., 122 Ga. 509, 50 S. E. 353; Doremus v. Hennessy, 176 Ill. 608, 52 N. E. 924; Walker v. Cronin, 107 Mass. 555; Johnston Harvester Co. v. Meinhardt, 9 Abb. New Cas. 393 (N. Y.); Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780; McCutchin v. Taylor, 11 Lea 259 (Tenn.); J. S. Brown Hardware Co. v. Indiana Stove Works, 96 Tex. 453, 73 S. W. 800.

[23] London Guarantee & Accident Co. v. Horn, 206 Ill. 493, 69 N. E. 526; Hollenbeck v. Ristine, 114 Iowa 358, 86 N. W. 377; Chipley v. Atkinson, 23 Fla. 206, 1 So. 934; Perkins v. Pendleton, 90 Me. 166, 38 Atl. 96; Lucke v. Clothing Cutters' and Trimmers' Assembly, 77 Md. 396, 26 Atl. 505;

tracts of employment, but contracts of a wide variety have been held to come within the protection of the rule under consideration.[24] Some jurisdictions adopt generally the line of argument of Coleridge, J., in Lumley v. Gye, and restrict the rule giving an action for inducing a breach of contract to contracts for personal service between master and servant.[25] But it is universally agreed, even in the jurisdictions of narrowest construction, that the party injured may have a right of action, whatever the contract, in cases where the breach is procured by fraud, deceit,

Moran v. Dunphy, 177 Mass. 485, 59 N. E. 125; Berry v. Donovan, 188 Mass. 353, 74 N. E. 603; Holder v. Cannon Mfg. Co., 135 N. C. 392, 47 S. E. 481.

[24] The following are some of the instances of contracts that have been held to come within the rule: Temperton v. Russell, (1893) 1 Q. B. 715 (Eng.), (contract to supply building materials); Angle v. Chicago, St. P., M. & O. Ry. Co., 151 U. S. 1, LEADING ILLUSTRATIVE CASES (contract for construction of railroad); Nashville, etc., R. Co. v. McConnell, 82 Fed. 65 (contract with carrier of passengers); Heath v. American Book Co., 97 Fed. 533 (contract by state for purchase of school books); Doremus v. Hennessy, 176 Ill. 608, 52 N. E. 924 (contract between laundry agent and laundries); Morehouse v. Terrill, 111 Ill. App. 460 (contract for purchase of farm); Jackson v. Stanfield, 137 Ind. 592, 36 N. E. 345 (contract for sale of goods); Beekman v. Marsters, 195 Mass. 205, 80 N. E. 817 (contract as hotel agent); Morgan v. Andrews, 107 Mich. 33, 64 N. W. 869 (contract for construction of machine); Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881 (contracts of advertisers with newspapers); Mealey v. Bemidji Lumber Co., 118 Minn. 427, 136 N. W. 1090 (contract to cut, haul and bank logs); Schonwald v. Ragains, 32 Okl. 223, 122 Pac. 203 (contracts to purchase ice); Rice v. Manley, 66 N. Y. 82 (contract for purchase of goods); Jones v. Stanly, 76 N. C. 355 (contract for transportation of goods); Raymond v. Yarrington, 96 Tex. 443, 73 S. W. 800 (agency for sale of goods); West Virginia Transportation Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591 (contract for transportation of oil by pipe line); Martens v. Reilly, 109 Wis. 464, 84 N. W. 840 (lease of real property).

[25] Boyson v. Thorn, 98 Cal. 578, 33 Pac. 592; Chambers v. Baldwin, 91 Ky. 121, 15 S. W. 57; Bourlier v. McCauley, 91 Ky. 135, 15 S. W. 60; Kline v. Eubanks, 109 La. 241, 33 So. 211; Wolf and Sons v. New Orleans Tailor Made Pants Co., 113 La. 388, 37 So. 2; Heywood v. Tillson, 75 Me. 225, 46 Am. Rep. 373; Glencoe Land & Gravel Co. v. Hudson Bros. Commission Co., 138 Mo. 439, 40 S. W. 93; McCann v. Wolff, 28 Mo. App. 447.

slander, nuisance, or other wrong actionable in itself.[26]

9. **The meaning of "malice."**—The declaration in Lumley v. Gye alleged that the wrong complained of was done maliciously. Lord Herschell in the case of Allen v. Flood,[27] said: "A study of the case of Lumley v. Gye, 2 El. & Bl. 216, 75 E. C. L. 216, has satisfied me that in that case the majority of the court regarded the circumstance that what the defendant procured was a breach of contract as the essence of the cause of action. It is true that the word 'maliciously' was to be found in the declaration, the validity of which was then under consideration; but I do not think that the learned judges regarded the allegation as involving the necessity of proving an evil motive on the part of the defendant, but merely as implying that the defendant had wilfully and knowingly procured a breach of contract." There is some variety of opinion as to the sense in which malice should be taken, and considerable confusion of mind on the subject, but in general it comes down to what is believed to be the better view, namely, that malice means intentional interference with a contractual relation without legal justification.[28]

10. **Damages recoverable.**—On the question, whether actual damage must be shown before a

[26] Boyson v. Thorn, 98 Cal. 578, 33 Pac. 592; Chambers v. Baldwin, 91 Ky. 121, 15 S. W. 57; Perkins v. Pendleton, 90 Me. 166, 38 Atl. 96; Raycroft v. Tayntor, 68 Vt. 219, 35 Atl. 53.

[27] (1898) A. C. 1 (Eng.), at p. 121.

[28] Walker v. Cronin, 107 Mass. 555; Berry v. Donovan, 188 Mass. 353, 74 N. E. 603; Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881.

recovery can be had for interference with a relation arising from contract, some cases hold that it is necessary to show that special damage has resulted from such interference;[29] while there are other cases that hold that the fact that actual damage may not be ascertainable does not defeat the right to recover at least nominal damages.[30]

[29] Bowen v. Hall, 6 Q. B. D. 333 (Eng); Temperton v. Russell, (1893) 1 Q. B. 715 (Eng.); Passaic Print Works v. Ely & Walker Dry Goods Co., 105 Fed. 163.

[30] Chipley v. Atkinson, 23 Fla. 206, 1 So. 934.

CHAPTER III.

INTERFERENCE WITH BUSINESS OR EMPLOYMENT.

11. **General ground for immunity from interference with business or employment.**—Rules of law, but newly formulated, governing the right of a person not to be interfered with in the exercise of his trade or business or in the disposal of his labor, would seem to be merely instances of the principle which has been thus stated: "At common law there was a cause of action whenever one person did damage to another wilfully and intentionally, and without just cause or excuse."[31] The same doctrine has been expressed in these words: "It has been considered that, prima facie, the intentional infliction of temporal harm is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape."[32]

12. **Right of non-interference formulated.**—Applying these principles to the matter under consideration we are justified in stating as an accepted legal doctrine that intentional interference with rights of business or employment is prima facie a tort and that, unless justification be shown, an action will lie. It should be clearly understood from the outset, that we are here dealing with relative rights,

[31] Bowen, L. J., in Skinner v. Shew (1893), 1 Ch. 413 (Eng.).
[32] Holmes, J., in Aikens v. Wisconsin, 195 U. S. 194.

not with absolute rights; that regard for the rights of one side must be met by regard for the rights of the other side; that in every controversy there are, for example, the right of the plaintiffs to be protected, let us say, in the exercise of their trade, the right of the defendants to carry on their business or to dispose of their labor, and with it all the right of the rest of the community to have their peace and comfort, the social and industrial order, preserved.

13. **Authoritative statements of the character of the right.**—"Every person has a right under the law, as between himself and his fellow-subjects, to full freedom in disposing of his own labor or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others."[33] "I think the right to employ their labor as they will is a right both recognized by the law and sufficiently guarded by its provisions to make any undue interference with that right an actionable wrong."[34] "He that hinders another in his trade or livelihood is liable to an action for so hindering him."[35]

14. **Same subject.**—"It seems a rather fine distinction to say that, where a defendant maliciously induces a person not to carry out a contract already made with the plaintiff and so injures the plaintiff,

[33] Erle, Law Relating to Trade Unions, p. 12.
[34] Halsbury, L. C., in Allen v. Flood (1898), A. C. 1 (Eng.).
[35] Holt, C. J., in Keeble v. Hickeringill, 11 East 575 (Eng.).

it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff, which he would otherwise have entered into, it is not actionable."[36] "Every man has a right under the law, as between himself and others, to full freedom in disposing of his own labor or capital according to his own will, and any one who invades that right without lawful cause or justification commits a legal wrong, and, if followed by an injury caused in consequence thereof, the one whose right is thus invaded has a legal ground of action for such wrong."[37] "The underlying right in this particular case under consideration, which seems to be coming into general recognition as the subject of protection by courts of equity, through the instrumentality of an injunction, appears to be the right to enjoy a certain free and natural condition of the labor market, which, in a recent case in the House of Lords, was referred to, in the language of Lord Ellenborough, as a 'probable expectancy.'"[38]

15. **Questions involved.**—The first question, where complaint is made of an alleged interference with business or employment, is whether the interference was legally a wrong, whether, among the several competing rights, there was such undue interference with the plaintiff's rights as to give him a prima facie ground of action. If this question be decided in the affirmative, the next question is whether there

[36] Lord Esher, M. R., in Temperton v. Russell, (1893) 1 Q. B. 715 (Eng.).

[37] Doremus v. Hennessy, 176 Ill. 608, 52 N. E. 924.

[38] See, for an illuminating discussion, the fuller statement by Stevenson, V. C., in Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230, LEADING ILLUSTRATIVE CASES.

was legal justification. There are still two other questions that are frequently involved and serve greatly to complicate the solution of the problem. These are, first, the question of malice, and, second, the question of conspiracy or combination.

16. **Justification.**—"The theory of justification consists in a proper adjustment and compromise between the two competing rights that are equally protected in law. It has been already observed that the enjoyment by a particular individual of the right of freedom, as to how he should bestow his capital and labor, is not absolute, but qualified by the existence of equal rights in the other members, to such an extent as to be made compatible with an equally free enjoyment of these rights by the rest of the community. In fact, every case of justification reduces itself to the question, how far the rights of an individual can be so circumscribed in accordance with a general law of freedom, as to leave an equal scope for the free enjoyment of the competing rights of his fellow men. ·Let us take, for instance, the ordinary case of two rival traders, bidding against each other for the custom of the country. It is clear, what is gain to one is loss to the other. Both are equally protected in the enjoyment of the right of freedom to dispose of their capital and labor in the way they may think best. If, in the course of this competition, one of them is put out of the field, he is purposely made to suffer damage by the other. The inquiry, which we are now concerned with, is to find out the principle which should determine the limit of the rights of the rival competitors, and the

extent to which each will be protected in the enjoyment of his rights, as compared with those of his brother."[39]

17. **Same subject—Justice Holmes' statement of the doctrine of justification.**—"In numberless instances the law warrants the intentional infliction of temporal damage because it regards it as justified. On the question as to what shall amount to a justification * * * the true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law, which nobody disputes. * * * It has been the law for centuries that a man may set up a business in a country town too small to support more than one, although he expects and intends thereby to ruin someone already there, and succeeds in his intent. In such a case he is not held to act unlawfully and without justifiable cause. * * * The reason, of course, is that the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of damage is privileged. * * * Yet even this proposition nowadays is disputed by a considerable body of persons, including many whose intelligence is not to be denied, little as we may agree with them. I have chosen this illustration partly with reference to what I have to say next. It shows without the need of further authority that the policy of allowing free competition justifies the intentional infliction of temporal damage, including the damage

[39] 28 Law Quarterly Review, 67.

of interference with a man's business, by some means, when the damage is done not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade."[40]

18. **Same subject—Lord Bowen's statement of the doctrine of justification.**—"We are presented in this case with an apparent conflict or antimony between two rights that are equally regarded by the law—the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others. The plaintiffs complain that the defendants have crossed the line which the common law permits; and inasmuch as, for the purposes of the present case, we are to assume some possible damage to the plaintiffs, the real question to be decided is whether, on such an assumption, the defendants in the conduct of their commercial affairs have done anything that is unjustifiable in law. [After considering the circumstances under which competition would be "unfair," the limitations of the right of competition were laid down in the following words:] If it was done bona fide in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unreasonable. * * * But such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoy-

[40] Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077.

ment of one's own rights. The good sense of the tribunal which had to decide would have to analyze the circumstances and to discover on which side of the line each case fell. But if the real object were to enjoy what was one's own, or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, and without any of the illegal acts above referred to, it could not, in my opinion, properly be said that it was done without just cause or excuse."[41]

19. **Competition.**—Competition as a justifying ground for interference with another's business rights has been accepted for centuries. In 1410 we have the Gloucester Schoolmaster's Case,[42] where the plaintiff claimed damages on account of the decrease in his revenue caused by the establishment of a rival school. The court held that the competition was in the interest of the public, and that there was consequently no ground whereon to maintain an action. And in 1889 we have the masterly opinion of Lord Justice Bowen in the Mogul case,[43] still maintaining the doctrine of competition as a justifying cause under the workings of the modern industrial order.

20. **Same subject—Fair and unfair competition—The Mogul case.**—Now, in order that competition may justify interference with business that would otherwise be illegal, the competition must be fair. This leads us to attempt to indicate what is fair, and what is unfair, competition. The most useful way

[41] Mogul Steamship Co. v. McGregor, L. R. 23 Q. B. D. 598 (Eng.).
[42] Y. B. 11 Henry IV, 47, 21 (Eng.).
[43] Mogul Steamship Co. v. McGregor, L. R. 23 Q. B. D. 598 (Eng.).

to do this is to review some of the more significant cases. In the important case of the Mogul Steamship Co. v. McGregor, made celebrated by the opinion of Lord Justice Bowen, we have a case where the extreme results of competition between rival business enterprises were held justified because within the limits of fair, although deadly, competition. In this case the defendant steamship company sent ships, additional in number to its usual custom, to Hankow and smashed rates in the China tea trade, in order to get rid of its competitors, either by ruining them or by driving them out of the field. The court ruled that the ruin of the plaintiff's business was justified on the ground of competition.

Lord Justice Bowen said: "The defendants, we are told by the plaintiff's counsel, might lawfully lower rates, provided they did not lower them beyond a 'fair freight,' whatever that may mean. But where is it established that there is any such restriction upon commerce? And what is to be the definition of a 'fair freight'? It is said that it ought to be a normal rate of freight, such as is reasonably remunerative to the shipowner. But over what period of time is the average of this reasonable remunerativeness to be calculated? All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order, by driving competition away, to reap a fuller harvest of profit in the future; and until the present argument at the bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' stand-

ard of freights or prices, or that law courts had a right to say to them in respect to their competitive tariffs, 'Thus far shalt thou go, and no further.' To attempt to limit English competition in this way would probably be as hopeless an endeavor as the experiment of King Canute."

21. **Same subject—Case of the Passaic Print Works.**—Another extreme case of competition, in another line of business, is that of Passaic Print Works v. Ely & Walker Dry Goods Co.[44] In this case the jobbers, defendants, issued a circular offering various brands of calicoes at prices below those of the manufacturers. No other jobbers could afford to sell them at such a figure, and this cutting of prices seriously injured the trade of the manufacturers. They accordingly complained that these cut prices were offered to the public for the sole purpose of working injury on them. Nevertheless, the majority of the court held that there was no ground for an action. It was said in the course of the opinion: "The owner of property, real or personal, has an undoubted right to sell it and to offer it for sale at whatever price he deems proper, although the effect of such offer may be to depreciate the market value of the commodity which he thus offers, and incidentally to occasion loss to third parties who have the same kind or species of property for sale."

22. **Same subject—Case of Tuttle v. Buck.**—In the case of Tuttle v. Buck,[45] we have, on the contrary, a case in which the court was unable to see

[44] 105 Fed. 163.

[45] 107 Minn. 145, 119 N. W. 946.

justifiable fair competition. The case stands pretty well alone, but affords a striking illustration of what would almost universally be regarded as morally unfair, and ought to be reprobated in law. Here the plaintiff had for many years carried on a profitable trade as barber in a certain village. The defendant, a banker and a man of great wealth and of personal and financial influence in the community, established a barber shop in the village, employed a barber to carry on the business, and used his influence to attract customers away from the plaintiff's shop, all for the sole purpose of injuring the plaintiff. The plaintiff's business was thereby ruined. The court held that defendant's conduct was unjustifiable, saying: "To divert to one's self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort."[46]

23. **Same subject—Cases of Lewis v. Huie-Hodge Lumber Co. and Graham v. St. Charles Street Railway.**—The contrast between a case of interference with another's business justified on the ground of

[46] Compare the interesting article by the late Professor J. B. Ames, How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor, in 18 Harvard Law Review, 411.

competition and a case not so justified is well brought out in two decisions, both rendered in Louisiana: Lewis v. Huie-Hodge Lumber Co.,[47] and Graham v. St. Charles Street Railway.[48] In the Lewis case the defendant was a corporation engaged in the manufacture of lumber, employing a large number of men in its business. In connection therewith it conducted a general mercantile store for the purpose of selling merchandise to its employees and to the public. Plaintiff opened a store of like character. The defendant corporation notified its employees that if they traded with the plaintiff they would be discharged. In the Graham case the manager of defendant street railway company notified the railway employees that they would be discharged if they continued to deal with the plaintiff, who conducted a grocery store. The object of the railway manager was to advance the interests of one of his tenants who conducted a store in competition with Graham.

In holding the defendants' conduct justified in the Lewis case, the court said: "The defendant company was not acting wantonly and maliciously to injure the plaintiff without any reason or cause moving it in its own interest in the premises. The animus which led the defendant to take the course it did was not to injure the plaintiff, but to protect and safeguard its own business interest." In the Graham case, in holding that the interference with the grocer's business did constitute an unjustified and actionable wrong, the court said: "In so doing the

[47] 121 La. 658, 46 So. 685.
[48] 47 La. Ann. 214, 16 So. 806.

defendants would not only control their own will, action, and conduct, but forcibly control and change, from pure motives of malice, the choice and will of others, through fear of non-employment or discharge. This will and power of choice, both the plaintiff and the parties themselves are entitled to have left free, and not coerced in order to simply work the former damage and injury."

24. **Same subject—Professor Wyman's statement of the rule of unfair competition.**—"We have, therefore, these differing views of the nature of the action for unfair competition, opposed in a fundamental way. By what may be called the earlier theory, it is said that any man can do in trade whatever he pleases to get trade away from another, provided he does nothing illegal in itself. But, by what is obviously the current philosophy of the matter, the beginning is made at the other end, by saying that every man engaged in business has a right to pursue his calling freely, and that consequently any interference with this business of his by another must be justified. What may, therefore, be carried forward into the subsequent discussion of various unfair practices in our complicated modern commerce, is the idea that to compete as one wills is not an absolute right in our law. On the contrary, competition is only a thing permitted by the State when its operation is for the best interests of established society, forbidden if it is carried on under circumstances prejudicial to the social order."[49]

25. **Malice.**—A great amount of confusion has been

[49] Wyman, Control of the Market, p. 55.

caused in the decisions in labor dispute cases and analogous cases by uncertainty as to the meaning and import of the word malice. Courts have reached opposite conclusions on almost identical facts because they have used this word in different senses. The term is used in certain torts, particularly malicious prosecution, in its popular sense; but where it is held to be an ingredient in most torts, including those now under consideration, it is used correctly only in a strictly legal or technical sense. The distinction between the two meanings was pointed out in 1825 by Bayley, J.: "Malice in common acceptation of the term means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse."[50]

26. **Same subject—Lord Bowen's view of the meaning and import of malice.**—Bowen, L. J., in the Mogul case, points out the distinction: "We were invited to accept the position that an action will lie, if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms 'maliciously,' 'wrongfully,' and 'injure' are words all of which have accurate meanings well-known to law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to 'injure' in strictness means more than an intent to harm. It connotes an attempt to do wrongful harm. 'Maliciously,' in like manner, means and implies an intention to do an act

[50] Bromage v. Prosser, 4 B. & C. 247 (Eng.).

which is wrongful to the detriment of another. The term 'wrongful' imports in its term the infringement of some right."[51]

27. **Same subject—Lord Watson's statement as to effect of malice.**—Lord Watson has said in effect that malice in its popular sense cannot be the ground of a civil action, in the following oft-quoted sentence: "No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious."[52] But the same judge has expressed the principle better in the case of Allen v. Flood: "But the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due."[53]

28. **Same subject—General result as to meaning and import of malice.**—Practically all the English and American judges agree in the view that malice, in its popular sense, that is, considered as a bad motive, is not sufficient to lay the basis for the class of torts of which we are now speaking. All the error and confusion of thought comes from not discriminating between the two meanings. For there is general agreement in all the well-considered cases that malice in the legal sense, as explained by Bayley, J., or by Bowen, L. J., enters into the very definition of the actionable tort of interference with business or employment. Lord Watson himself, in the passage last cited, says: "A wrongful act done knowingly

[51] Mogul Steamship Co. v. McGregor, 23 Q. B. D. 598 (Eng.), at p. 612.
[52] Mayor of Bradford v. Pickles (1895), A. C. 587 (Eng.), at p. 598.
[53] Allen v. Flood (1898), A. C. 1 (Eng.), at p. 92.

and with a view to its injurious consequences may, in the sense of law, be malicious; but such malice derives its essential character from the circumstance that the act does constitute a violation of law."

29. **Combination.**—Another question, which has given rise to much discussion and to variety and even conflict of decision, is whether what is innocent when done by a single individual is still always innocent when done by a combination of individuals. A much quoted statement is this: "What one man may lawfully do singly, two or more may lawfully do jointly. The number who unite to do the act cannot change its character from lawful to unlawful."[54] And in the New York court the same idea has been expressed in these words: "Whatever one may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act."[55]

30. **Same subject—Views expressed in Quinn v. Leathem.**—On the other hand, many answers, intended to be more discriminating and accurate, have been given to the view as stated in the last section. In the highly important case of Quinn v. Leathem,[56] a number of the lords took occasion to express their views on the part that combined action may play in determining the liability of the defendants. Lord Bramwell, for instance, said: "I think there is an obvious answer, indeed, two; one is that a man may encounter the acts of a single person, yet not be

[54] Mitchell, J., in Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119.

[55] Parker, C. J., in National Protective Association v. Cumming, 170 N. Y. 315, 63 N. E. 369.

[56] Quinn v. Leathem, (1901) A. C. 495 (Eng.).

fairly matched against several. The other is, that the act when done by an individual is wrong though not punishable, because the law avoids multiplicity of crimes: *de minimis non curat lex;*—while if done by several it is sufficiently important to be treated as a crime." Lord Lindley said: "Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce." And Lord Brampton spoke as follows: "Much consideration of the matter has led me to be convinced that a number of actions and things not in themselves actionable or unlawful if done separately without conspiracy, may, with conspiracy, become dangerous and alarming, just as a grain of gunpowder is harmless but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine, but administered frequently and in larger quantities with a view to harm may be fatal as a poison."

31. **Same subject—Frederic J. Stimson's view.**—"Why should a few men be punished or be liable when no one does anything that is criminal, and even the combination intends no crime? The answer is, in logic, the tremendous power of combination; in history, the whole course and origin of English law; in morals, the fact that of all our English law this law recognizes most profoundly the necessary conditions of individual liberty and well being, as well as the principles of the moral law."[57]

[57] Frederic J. Stimson, The Law of Combined Action or Possession, 45 American Law Review, 1.

32. **Same subject—Doremus v. Hennessy.**—It will conduce to a clear understanding of this particular topic, as well as contribute to a knowledge of the whole subject of actionable interference with business and employment, to review a few concrete cases. In the case of Doremus v. Hennessy,[58] the plaintiff carried on a laundry business, not by operating a plant of her own, but by employing several laundry companies to do the work of her customers. Defendants were members of a laundrymen's association, which had fixed a scale of prices for laundry work, and conspired to injure the plaintiff in her good name and credit and to destroy her business, because she would not charge prices in accordance with their scale. The court decided in her favor. "A combination by them to induce others not to deal with appellee or enter into contracts with her, was an actionable wrong." The court held, in effect, that intentional interference with business rights is prima facie a tort; that, while competition may be a justification, unfair competition is not a justification, and that "an act maliciously done, with the intent and purpose of injuring another, is not lawful competition."

33. **Same subject—Brown v. Jacobs Pharmacy Co.**—In the Georgia case of Brown v. Jacobs Pharmacy Co.,[59] the plaintiff had formerly been a member of the Atlanta Retailers' Association, but had withdrawn therefrom because of charges preferred against him for violation of its rules. The Retailers'

[58] 176 Ill. 608, 52 N. E. 924.
[59] 115 Ga. 429, 41 S. E. 553.

Association thereupon notified the Wholesalers' Association that no retailer in the local association would buy of a wholesaler who sold to a rate cutter. In granting an injunction the court said: "The individual right is radically different from the combined action. The combination has hurtful powers and influences not possessed by the individual. It threatens and impairs rivalry in trade, covets control in prices, seeks and obtains its own advancement at the expense and in the oppression of the public. The difference, in legal contemplation, between individual right and combined action in trade, is seen in numerous cases. To protect the individual against encroachments upon his rights by a greater power is one of the most sacred duties of the courts."

34. **Same subject—Delz v. Winfree.**—The Texas case of Delz v. Winfree[60] points out strongly the fact that the question of absolute rights stops with the individual, and when persons act together influencing the minds of other persons the rights become relative. In this case the plaintiff was a butcher and his complaint was that several persons had induced others not to sell him live animals for cash, whereby he was greatly injured in his business. In considering the legality of such conduct, the court said: "The appellee also asserts the following proposition, which may be conceded to be correct: 'A person has an absolute right to refuse to have business relations with any person whomsoever, whether the refusal is based upon reason or is the result of whim, caprice, prejudice, or malice, and there is no

[60] 80 Tex. 400, 16 S. W. 111.

law that forces a man to part with his title to his property.' The privilege here asserted must be limited, however, to the individual action of the party who asserts the right. It is not equally true that one person may, from such motives, influence another person to do the same thing."

35. **Same subject—Bailey v. Master Plumbers' Association.**—The same view is re-enforced from another angle by the acute observations of the court in the Tennessee case of Bailey v. Master Plumbers' Association.[61] In this case a by-law of the defendant association forbade its members to purchase from dealers who sold to outsiders. In commenting upon the cases of Macauley v. Tierney[62] and Bohn Mfg. Co. v. Hollis,[63] the court said: "In our opinion, it does not follow from this undoubted freedom of the individual member and individual dealer that all of the members may, as ruled in those cases, lawfully enter into a general and unlimited agreement, in the form of by-laws, that they, and all of them, will make their purchases from only such dealers as will sell to members exclusively. The premise does not justify the conclusion. The individual right is radically different from the combined action. * * * The fact that every plumber in the city of Memphis had the legal right originally to purchase supplies and materials from any dealer or dealers he might choose did not justify the association in the passage of by-laws requiring its members to buy from that

[61] 103 Tenn. 99, 52 S. W. 853.
[62] 19 R. I. 255, 33 Atl. 1.
[63] 54 Minn. 223, 55 N. W. 1119.

class of dealers it saw fit to name. The two things are not the same, but antagonistic."

36. **Same subject—Martell v. White.**—A wisely judicious view is expressed by Mr. Justice Hammond on the question whether combination tends to make competition unfair: "Nothing need be said in support of the general right to compete. To what extent combination may be allowed in competition is a matter about which there is as yet much conflict, but it is possible that in a more advanced stage of the discussion, the day may come when it will be more clearly seen and will more distinctly appear in the adjudications of the courts than as yet has been the case, that the proposition that what one man lawfully can do, any number of men, acting together by combined agreement, lawfully may do, is to be received with newly disclosed qualifications arising out of the changed conditions of civilized life and of the increased facility and power of organized combination, and that the difference between the power of individuals acting each according to his preference, and that of an organized and extensive combination, may be so great in its effect upon public and private interests as to cease to be one of degree and to reach the dignity of a difference in kind."[64]

37. **Strikes—Definition.**—There is more or less diversity in the definitions given to a strike, according as the person defining lays stress upon the one or the other of the two elements that go to make up the definition. These elements are, first, a ceasing from work, but not from employment; and, second,

[64] Martell v. White, 185 Mass. 255, 69 N. E. 1085.

compulsion to extort from the employers the concession desired. The definition in Worcester's Dictionary is: "To cease from work in order to extort higher wages as workmen"; in Webster's Dictionary: "To quit work in a body, or by combination, in order to compel their employers to raise their wages"; in Bouvier's Law Dictionary: "A combined effort of workmen to obtain higher wages or other concessions from their employers by stopping work at a preconcerted time"; in Black's Law Dictionary: "The act of a party of workmen employed by the same master, in stopping work all together at a preconcerted time, and refusing to continue, until higher wages or shorter time or some other concession is granted to them by the employer."

38. **Same subject—Legality of strikes.**—Laborers have a conceded right to organize as labor unions to promote their common welfare. From this it is likewise conceded that they have, as a union, the right to strike. But is also generally held that some strikes by employees may be illegal. "If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that when combined, they have the same liberty that combined capital has, to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control."[65] "Workingmen have the right to organize for the purpose of securing higher wages, shorter

[65] Holmes, J., in Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077.

hours of labor, or improving their relations with their employers. They have the right to strike (that is, to cease working in a body by prearrangement until a grievance is redressed), provided the object is not to gratify malice, or inflict injury upon others, but to secure better terms of employment for themselves. A peaceable and orderly strike, not to harm others, but to improve their own condition, is not a violation of law."[66]

39. **Same subject—Legality of purpose of strike a question of law.**—The legality of a strike depends upon the purpose for which the combination is formed, or, the purpose for which the employees strike. And the determination of the question whether the purpose for which a strike is called is a justification, is, it is held, a question of law for the court to decide. "To justify interference with the rights of others, the strikers must in good faith strike for a purpose which the court decides to be a legal justification for such interference. To make a strike a legal strike it is necessary that the strikers should have acted in good faith in striking for a purpose which the court holds to have been a legal purpose for a strike, but it is not necessary that they should have been in the right in instituting a strike for that purpose. On the other hand, a strike is not a strike for a legal purpose because the strikers struck in good faith for a purpose which they thought was a sufficient justification for a strike.

[66] Vann, J., in National Protective Association v. Cumming, 170 N. Y. 315, 63 N. E. 369; Minasian v. Osborne, 210 Mass. 250, 96 N. E. 1036, LEADING ILLUSTRATIVE CASES.

As we have already said, to make a strike a legal strike the purpose of the strike must be one which the court as matter of law decides is a legal purpose of a strike, and the strikers must have acted in good faith in striking for such a purpose."[67]

40. **Same subject—The sympathetic strike.**—A so-called sympathetic strike has been described as "a strike not to forward the common interests of the strikers, but to forward the interests of an individual employee in respect to a grievance between him and his employer where no contract of employment exists."[68] The strike in this case was against the open shop, and it was construed by the majority of the court to be in the nature of a sympathetic strike, unjustifiable, and relief was given to the employers against the strikers. The case of Pickett v. Walsh[69] embraced both the direct strike and the sympathetic strike. It involved no controversy between the employers and employees, but arose out of an internal conflict within the ranks of labor itself. In this case persons engaged in the trade of brick pointing were denied relief against a strike by bricklayers for the purpose of themselves obtaining such work of pointing; but they were allowed relief against a strike by bricklayers employed by an employer with whom the bricklayers had no dispute, the purpose of the latter, or sympathetic, strike being to force the employer to force

[67] DeMinico v. Craig, 207 Mass. 593, 94 N. E. 317.

[68] Reynolds v. Davis, 198 Mass. 294, 84 N. E. 457. Mr. Justice Knowlton dissented, because from his view of the facts he did not consider that there was here a "purely sympathetic strike."

[69] 192 Mass. 572, 78 N. E. 753.

the other employer to yield to the demand of his employees. The court decided: "Organized labor's right to coercion and compulsion is limited to strikes against persons with whom the organization has a trade dispute, or, to put it in another way, we are of opinion that a strike against A, with whom the strikers have no trade dispute, to compel A to force B to yield to the strikers' demands, is an unjustifiable interference with the right of A to pursue his calling as he thinks best."

41. **Same subject—Illegal accompaniments of strikes.**—It may be taken as an accepted rule of law that the simple strike is legal. It is seldom, however, that a strike case comes before a court which is not attended by other factors, such as boycotting, picketing, disorder, or intimidation. Indeed, a strike rarely seems capable of effecting its purpose unless it is accompanied by the very elements that will expose it to the censure of the law. A lawful weapon is very readily converted into an unlawful one.

42. **Boycott—Definition.**—The term boycott is of very recent origin, dating back only to about the year 1880.[70] Definitions which have been given to it are deduced largely from its practical workings. We here state several of such definitions. "A combination to harm one person by coercing others to harm him."[71] "A combination of many to cause a loss to one person by coercing others, against their

[70] The history of the term boycott may be found in State v. Glidden, 55 Conn. 46, 8 Atl. 890, and in Crump v. Commonwealth, 84 Va. 927, 6 S. E. 620.

[71] American Federation of Labor v. Buck's Stove & Range Co., 33 App. Cas. (D. C.) 83.

will, to withdraw from him their beneficial business intercourse, through threats that, unless those others do so, the many will cause similar loss to them."[72] "A combination to injure or destroy the trade, business or occupation of another, by threatening injury to the trade, business, or occupation of those who have business relations with him."[73] "The exclusion of the employer from all communication with former customers and material men by threats of similar exclusion to the latter if dealings are continued."[74] "A combination to cause loss to one person by coercing others against their will, to withdraw from him their beneficial business intercourse, by threats that unless these others do so, the combination will cause similar loss to them, or by the use of such means as the infliction of bodily harm on them, or such intimidation as will put them in fear of bodily harm."[75]

43. **Same subject—Primary boycott.**—For the purposes of clear understanding, we should distinguish between a boycott as defined above and what has sometimes been called a "primary boycott." We meet with the situation of a primary boycott, when the members of a union, acting by agreement among themselves and for their common interest, cease to patronize a person against whom the concert of action is directed.[76] Such action is regarded as en-

[72] Toledo, etc., R. Co. v. Pennsylvania Co., 54 Fed. 730.

[73] Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997.

[74] Moores v. Bricklayers' Union, 10 Oh. Dec. (Reprint) 665, 23 Oh. W. L. B. 48.

[75] Martin, The Modern Law of Labor Unions, p. 103.

[76] Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324, should be studied carefully in this connection.

tirely lawful. Labor organizations, it is said, have a right to withhold patronage from one who does not give fair compensation for labor.[77] A combination between persons merely to regulate their own conduct and affairs is held a lawful combination, even though others may be indirectly affected thereby.[78] If an employer of labor refuses to employ union men, the union may say that its members will not patronize him.[79] There is, then, a close analogy between the so-called primary boycott and the justifiable strike. In the former, patronage is withheld for the purpose of effecting the object of the combination, while in the latter labor is similarly withheld to accomplish the desired end.

44. **Same subject—Methods pursued in boycotts.**—In the so-called primary boycott the dispute is confined to two parties, the combination and the person against whom the boycott is directed. In the boycott, or boycott proper, or what is sometimes called the "secondary boycott,"[80] the object of the combination is to coerce a third party, who has no interest in the dispute, by threats of injury to him, in order to compel the person against whom the combination is directed to accede to its demands. The usual methods adopted in such a boycott against an employer of labor are: First, coercing workmen to quit his employment, or not to enter his employment, in order to deprive him of the labor that is essential for the conduct of his business. Second, the coercing

[77] People v. Radt, 71 N. Y. Supp. 846.
[78] Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663.
[79] Casey v. Cincinnati Typographical Union, 45 Fed. 135.
[80] Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324.

of his customers, actual or prospective, to withhold their patronage. Third, the coercing of dealers in materials or products, necessary to a person's business, not to sell to him.[81]

45. **Same subject—Coercing workmen not to work.**—A combination to injure a person's business by preventing workmen in his service from continuing to work for him, or by preventing workmen not in his service but willing to accept employment from him from doing so, by the use of force, violence, or intimidation, is an actionable wrong.[82] Intimidation is regarded as unlawful as violence, and wherever the circumstances are such as to carry a threatening intimation for the purpose of preventing laborers from working, intimidation will be found.[83]

46. **Same subject—Coercing customers to withhold patronage.**—A combination of workmen formed for the purpose of coercing the customers, actual or prospective, of a person against whom the combination is directed, to withhold their patronage from him, is generally held to be an unlawful conspiracy. The coercion may take the form of threatening the customers that, if they do not join in the boycott, their business will be injured by loss of patronage to them. This threat may be merely that the patronage at the disposal of members of the combination will be withdrawn from such customers, or the threat

[81] Martin, The Modern Law of Labor Unions, p. 111.

[82] Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324; My Maryland Lodge v. Adt, 100 Md. 238, 59 Atl. 721; Beck v. Railway Teamsters' Union, 118 Mich. 497, 77 N. W. 13; Reinecke Coal Min. Co. v. Wood, 112 Fed. 477.

[83] George Jonas Glass Co. v. Glass Bottle Blowers' Ass'n, 72 N. J. Eq. 653, 66 Atl. 953; Allis-Chalmers Co. v. Iron Molders' Union, 150 Fed. 155.

may be that like coercion will be brought to bear on persons not in the combination to have them withhold their patronage from such customers. The great weight of authority holds that all such boycotts are unlawful. The principle underlying these decisions is that organized labor's right of coercion by strikes and boycotts is limited to strikes and boycotts against those with whom the combination has a trade dispute.[84] There are, however, a few strongly expressed opinions, which take a different position. According to these views, a combination of workmen having a trade dispute with their employer may not only boycott him, but may threaten others that if they do not also boycott him, by withholding their patronage, they will in turn be boycotted. A few decisions hold that even such secondary boycotts may be legal.[85]

47 **Same subject—Coercing material men not to sell to boycotted person.**—Where a combination, having declared a boycott against a certain person, threatens to cause strikes against persons dealing in materials, or to boycott them, if they sell their materials to the boycotted person, such combination, it is held, is liable for an actionable wrong. The English case of Temperton v. Russell[86] and the Ohio

[84] Wilson v. Hey, 232 Ill. 389, 83 N. E. 928; My Maryland Lodge v. Adt, 100 Md. 238, 59 Atl. 721; Beck v. Railway Teamsters' Union, 118 Mich. 497, 77 N. W. 13; Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Crump v. Commonwealth, 84 Va. 927, 6 S. E. 620; Rocky Mountain Bell Telephone Co. v. Montana Federation of Labor, 156 Fed. 809.

[85] Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324; on this point consult also Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264, 96 Pac. 127.

[86] (1893) 1 Q. B. 715 (Eng.).

case of Moores v. Bricklayers' Union[87] are cases in point. In the Ohio case a labor union became involved in a trade dispute with one Parker, and declared a boycott against him. In order to bring Parker to terms, the union notified material men that any one selling to him would in turn be boycotted. Moores, the plaintiff, persisted in selling to Parker. Thereupon the union notified all plaintiff's customers and probable customers that none of its members would work Moores' material. The effect was to interfere seriously with plaintiff's business. Taft, J., said: "The dealings between Parker Bros. and their material men, or between such material men and their customers, had not the remotest natural connection, either with defendants' wages or their other terms of employment. There was no competition or possible contractual relation between plaintiffs and defendants, where their interests were naturally opposed. The right of the plaintiffs to sell their material was not one which, in its exercise, brought them into legitimate conflict with the right of defendants to dispose of their labor as they chose. The conflict was brought about by the effort of defendants to use plaintiffs' right of trade to injure Parker Bros., and upon failure of this, to use plaintiffs' customers' right of trade to injure plaintiffs. Such effort cannot be in the bona fide exercise of trade, is without just cause, and is, therefore, malicious."

48. **Picketing—Definition—Legality.**—While the majority of courts take the view that picketing is

[87] 10 Oh. Dec. (Reprint) 665, 23 Oh. W. L. B. 48.

not of itself unlawful, some decisions go to the length of holding that all picketing is unlawful. This difference of attitude as to the character of picketing naturally has affected its definitions. "It will not do to say that these pickets are thrown out for the purpose of peaceable argument and persuasion. They are intended to intimidate and coerce. As applied to cases of this character, the lexicographers thus define the word picket: 'A body of men belonging to a trades union sent to watch and annoy men working in a shop not belonging to the union, or against which a strike is in progress.' Cent. Dict.; Webst. Dict. The word had originally no such meaning. This definition is the result of what has been done under it, and the common application that has been made of it."[88] As a general rule, the decision of the question whether picketing is lawful or unlawful depends on the circumstances of each case. Such circumstances are the size of the guard, the extent of their occupation of the street, and what they say and do. Taking every circumstance into account, if it appear that the purpose of the picketing is to interfere with those passing into or out of the works or premises, by other than mere persuasive means, it is illegal. If the design of the picketing is to see who can be the subject of persuasive inducements, such picketing is legal. The conduct of the pickets themselves may determine whether the picketing is legal or illegal.

49. **Same subject—Picketing accompanied by unlawful means.**—Where the picketing is carried on

[88] Beck v. Railway Teamsters' Union, 118 Mich. 497, 77 N. W. 13.

particular judge."[95] This argument draws too strongly on the inherent tendency of picketing.

51. **Slander of title.**—So-called slander of title seems really to be a phase of the right of a man not to be interfered with in the transaction of his business. It has been placed by writers of treatises on torts in a variety of places, it being frequently connected with, or subjoined to, the discussion of libel and slander. It would seem properly to find its place under the tort of interference with trade or calling. Disparagement of title would be a more appropriate name, but slander of title has become a well-recognized phrase of the law. An action therefor is allowed to be maintained against a person who falsely and maliciously disparages another's title to property, whether real or personal, whereby special pecuniary loss or damage is suffered. The rule is so strict as to special damage, that it has to be distinctly and particularly set out in the complaint.[96] While there are courts that maintain that it is necessary to establish express malice, the better opinion is that the malice regarded as a necessary ingredient in slander of title is to be taken in the same sense as in other torts of the kind now being considered.[97]

52. **Same subject—Instances of slander of title.**—Suits for slander of title are not of frequent occurrence; and a large proportion of the suits that are brought fail because special damage is not shown.

[95] A. R. Barnes & Co. v. Chicago Typographical Union, 232 Ill. 424, 83 N. E. 940.

[96] Burkett v. Griffith, 90 Cal. 532, 27 Pac. 527.

[97] Manitoba Free Press Co. v. Nagy, 39 Can. Sup. Ct. 340.

Actions of this kind have been sustained in cases disparaging title in such instances as follows: in claiming a lease of real property, thereby preventing a lease to another;[98] stating that ore on the plaintiff's land is nearly played out, thereby preventing a sale;[99] forbidding an auction sale of land on the ground that the party offering it has no right to sell it;[1] alleging insanity of a former owner, thereby casting doubt on the plaintiff's title;[2] alleging the illegality of a marriage, which would make a defect in the plaintiff's title;[3] publishing in a newspaper a story that a house was haunted, whereby the value was depreciated, and a sale prevented.[4]

53. **Disparagement of goods.**—The action for disparagement of the goods of a merchant is, as Pollock, B., says, in the nature of an action of slander of title. It is often called trade libel. The leading case on the subject is perhaps the Western Counties Manure Company v. Lawes Chemical Manure Company,[5] in which Bramwell, B., and Pollock, B., gave valuable opinions. The defendants had published false statements depreciating the value of plaintiffs' artificial fertilizers in comparison with the defendants' fertilizers. Bramwell, B., said: "It appears there was a statement published by the defendants of the plaintiffs' manufacture, which is comparatively disparaging of that manufacture, which is untrue so far as it

[98] Gerrard v. Dickenson, Cro. Eliz. 196 (Eng.).
[99] Paull v. Halferty, 63 Pa. 46.
[1] Gent v. Lynch, 23 Md. 58.
[2] Pitt v. Donovan, 1 Maule & S. 639 (Eng.).
[3] Bold v. Bacon, Cro. Eliz. 346 (Eng.).
[4] Manitoba Free Press Co. v. Nagy, 39 Can. Sup. Ct. 340.
[5] L. R. 9 Exch. 218 (Eng.).

disparages it, and which has been productive of special damage to the plaintiffs. * * * It seems to me that where a plaintiff says, 'You have without lawful cause made a false statement about my goods to their comparative disparagement, which false statement has caused me to lose customers,' an action is maintainable." Pollock, B., said: "It is alleged that the defendants were contriving and intending to injure the plaintiffs in their business, and that they falsely and maliciously printed and published the words in question. * * * Therefore, we have it stated that without legal occasion, without any necessity, the defendants have used language of and concerning the plaintiffs' goods which not only are false, but are such as to injure the plaintiffs in their business, and special damage is alleged. When all these things occur it seems to me a good cause of action is disclosed."

54. **Same subject—Cases not actionable.**—On the other hand, if the interference with a merchant's business by the disparagement of his goods is justified, if there is occasion in the eye of the law for the statements, the ground of action is lacking. The most common justification is competition. A well considered case is that of White v. Mellin.[6] The plaintiff in this case was the proprietor of Mellin's Food; the defendant was proprietor of Vance's Food. The defendant was in the habit, in retailing to the public Mellin's Food, to attach to the wrappers on Mellin's bottles the following label: "Notice. The public are recommended to try Dr. Vance's Food for

[6] (1895) A. C. 154 (Eng.).

infants and invalids, it being far more nutritious and healthful than any other preparation yet offered. [Then giving prices.]" Lord Herschell said: "I entertain very grave doubts whether any action could be maintained for an alleged disparagement of another's goods, merely on the allegation that the goods sold by the party who is alleged to have disparaged his competitor's goods are better either generally or in this or that particular respect than his competitor's are. * * * Just consider what a door would be opened if this were permitted. That this sort of puffing advertisement is in use is notorious; and we see rival cures advertised for particular ailments. The court would then be bound to inquire, in an action brought, whether this ointment or this pill better cured the disease which it was alleged to cure—whether a particular article of food was in this respect or in that better than another. Indeed, the courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better."

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LAW OF TORTS

PART VIII

RIGHT OF PRIVACY

BY

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1. **Principle underlying the right of privacy.**—"That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses vi et armis. The 'right to life' served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights

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broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term 'property' has grown to comprise every form of possession—intangible, as well as tangible.

2. **Expansion of the common law.**—"Thus, with the recognition of the legal value of sensations, the protection against actual bodily injury was extended to prohibit mere attempts to do such injury; that is, the putting another in fear of such injury. From the action of battery grew that of assault. Much later there came a qualified protection of the individual against offensive noises and odors, against dust and smoke, and excessive vibration. The law of nuisance was developed. So regard for human emotions soon extended the scope of personal immunity beyond the body of the individual. His reputation, the standing among his fellow men, was considered, and the law of slander and libel arose. Man's family relations became a part of the legal conception of his life, and the alienation of a wife's affections was held remediable. Occasionally the law halted,—as in its refusal to recognize the intrusion by seduction upon the honor of the family. But even here the demands of society were met. A mean fiction, the action *per quod servitium amisit* (whereby he lost the service), was resorted to, and by allowing damages for injury to the parents' feelings, an adequate remedy was ordinarily afforded. Similar to the expansion of the right to life was the growth of the legal conception of property. From

corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and processes of the mind, as works of literature and art, good-will, trade secrets, and trademarks.

"This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterized the common law enabled the judges to afford the requisite protection, without the interposition of the legislature."[1]

3. **History of the right of privacy.**—The foregoing sections are the opening paragraphs of an article published in 1890, which for the first time formulated the doctrine of a right of privacy. The expression, right of privacy, was until then all but unknown as a legal term. Lord Chancellor Cottenham, in 1849, in a case in which the Prince Consort sought to restrain the publication of a catalogue of a series of etchings made by Queen Victoria, and to prohibit the exhibition of reproductions of the etchings themselves, had, indeed, said: "In the present case, where privacy is the right invaded, postponing the injunction would be equivalent to denying it altogether."[2] We cannot say, however, that he in-

[1] S. D. Warren and L. D. Brandeis, The Right to Privacy, 4 Harvard Law Review, 193.

[2] Prince Albert v. Strange, 1 Macn. & G. 25 (Eng.).

tended explicitly to recognize a legal right to be known distinctively by the name of right of privacy, although he seems to imply the existence of such a right. Similarly, Vice Chancellor Knight Bruce, in another hearing of the same case, seems to imply the existence of a right of privacy where he says: "I think, therefore, not only that the defendant here is unlawfully invading the plaintiff's rights, but also that the invasion is of such a kind and affects such property as to entitle the plaintiff to the preventive remedy of an injunction; and if not more, yet, certainly, not the less, because it is an intrusion,—an unbecoming and unseemly intrusion,—an intrusion not alone in breach of conventional rules, but offensive to the inbred sense of propriety natural to every man,—if intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life,—into the home (a word hitherto sacred among us), the home of a family whose life and conduct form an acknowledged title, though not their only unquestionable title, to the most marked respect in this country."[3]

Judge Cooley in his work on Torts, in discussing the right of personal immunity, uses this language: "The right to one's person may be said to be a right of complete immunity: to be let alone."[4] The expression "to be let alone" comprehends the whole idea of the right of privacy; but it is at least doubtful whether the learned writer had in mind any such rights of immunity as we now regard as falling under the right of privacy. The Rhode Island court

[3] Prince Albert v. Strange, 2 DeGex & Sm. 652 (Eng.).
[4] Cooley, Torts (3d ed.), p. 33.

seems to be right in saying of this passage: "The paragraph is given over entirely to a discussion of the doctrine of assault. The author is not, therefore, ushering in a new right of complete immunity. The right 'to be let alone' refers unmistakably to the right to be free from bodily injury, or from a reasonable fear of bodily injury, at the hands of a fellow being."[5]

4. **Definitions of right of privacy.**—Chief Justice Parker defined the right of privacy as follows: "The so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has a right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals, or newspapers; and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise."[6] The Chief Justice further developed what he conceived to be logically involved in a right of privacy. But his purpose seems to have been to demonstrate the absurdity of the existence of such a right and its consequent untenability.

In the same case Justice Gray, in a dissenting opinion, described his conception of the right of privacy in the following language: "The right of

[5] Henry v. Cherry, 30 R. I. 13, 73 Atl. 97.

[6] Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, LEADING ILLUSTRATIVE CASES.

privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regards his person and property as inviolate, and he has the absolute right to be let alone. The principle is fundamental and essential in organized society that every one, in exercising a personal right and in the use of his property, shall respect the rights and properties of others. He must so conduct himself in the enjoyment of the rights and privileges which belong to him as a member of society, as that he shall prejudice no one in the possession and enjoyment of those which are exclusively his."[7]

A well-considered discussion of the subject says: "It becomes necessary, then, to determine whether the right of privacy exists upon common law principles as a legal personal right. It seems fair to argue that it should be embraced within the guarantee of personal security, which includes the right to enjoyment of life, and is invaded by a deprivation of those privileges and immunities which are reasonably necessary to such enjoyment according to the temperament of the individual. But the doctrine of an absolute right of privacy, if adopted without qualification, would evidently result in prohibiting acts long recognized as lawful, and not intended to be embraced within it, and it would conflict to a very

[7] Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, LEADING ILLUSTRATIVE CASES.

great extent with the principle of liberty of speech and of the press. If, however, the right were less broadly stated as an 'immunity from wrongful publicity,' these difficulties would largely be obviated; the line of demarcation in determining what should constitute the wrong would be ascertainable as readily as it is in cases involving negligence and reasonable user; and the sound distinction between men who have waived their immunity by entering on a public life, and those whose mode of life is a private one, would be not only preserved but accentuated."[8]

5. **Analogy between the right to privacy and the right to intellectual and artistic property.**—"The legal doctrines relating to infractions of what is ordinarily termed the common law right to intellectual and artistic property are, it is believed, but instances and applications of a general right to privacy, which, properly understood, afford a remedy for the evils under consideration. The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. Under our system of government, he can never be compelled to express them (except upon the witness stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not depend upon the particular method of expression adopted. It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music. Neither does the

[8] 11 Columbia Law Review, 566.

existence of the right depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression. The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece. In every such case the individual is entitled to decide whether that which is his shall be given to the public. No other has the right to publish his productions in any form, without his consent. This right is wholly independent of the material on which, or the means by which, the thought, sentiment, or emotion is expressed. It may exist independently of any corporeal being, as in words spoken, a song sung, a drama acted. Or if expressed on any material, as a poem in writing, the author may have parted with the paper, without forfeiting any proprietary right in the composition itself. The right is lost only when the author himself communicates his production to the public,—in other words, publishes it. It is entirely independent of the copyright laws, and their extension into the domain of art. The aim of those statutes is to secure to the author, composer, or artist the entire profits arising from publication; but the common law protection enables him to control absolutely the act of publication, and in the exercise of his own discretion, to decide whether there shall be any publication at all. The statutory right is of no value, unless there is a publication; the common law right is lost as soon as there is a publication."[9]

[9] 4 Harvard Law Review, 193, 198.

6. **Distinction between right to privacy and right to reputation.**—"Owing to the nature of the instruments by which privacy is invaded, the injury inflicted bears a superficial resemblance to the wrongs dealt with by the law of slander and of libel. The principle on which the law of defamation rests, covers, however, a radically different class of effects from those for which attention is now asked. It deals only with damage to reputation, with the injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows. The matter published of him, however widely circulated, and however unsuited to publicity, must, in order to be actionable, have a direct tendency to injure him in his intercourse with others, and even if in writing or in print, must subject him to the hatred, ridicule, or contempt of his fellow men,—the effect of the publication upon his estimate of himself and upon his own feelings not forming an essential element in the cause of action. In short, the wrongs and correlative rights recognized by the law of slander and libel are in their nature material rather than spiritual. That branch of the law simply extends the protection surrounding physical property to certain of the conditions necessary or helpful to worldly prosperity."[10]

7. **Classification of the decisions.**—If there is legal right of privacy, it is now in process of being judicially recognized. Certain courts have strenuously denied the existence of such a right; other courts have as emphatically affirmed its existence.

[10] 4 Harvard Law Review, 193, 197.

The subject has been brought directly and explicitly before relatively few of the American jurisdictions. In all jurisdictions where the issue has yet to be decided by the courts of last resort, all discussions of the subject, whether in majority opinions or in dissenting opinions, are of equal validity.

There are two general classes of cases, one in which a person's likeness has been published for purposes of commercial gain, the other in which the publisher of the likeness has had no such ulterior object. In several cases the person, the publication of whose likeness was objected to, was dead. In the larger number of cases the commercial element has been present, the plaintiff's picture being published for the exploitation of the publisher's business without the consent of the plaintiff. Thus, there was an action on account of the widespread publication of a young woman's face for advertising a brand of flour, in which the plaintiff finally lost her suit;[11] an action on account of the publication, in connection with an advertisement of a life insurance company, of an unauthorized indorsement of the company by the plaintiff, together with his picture, in which case the plaintiff was granted relief;[12] an action on account of the publication of the plaintiff's name and picture on the labels of bottles of a patent medicine, wherein the plaintiff's right was upheld;[13] an action

[11] Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, LEADING ILLUSTRATIVE CASES.

[12] Pavesich v. New England Life Insurance Co., 122 Ga. 190, 50 S. E. 68, LEADING ILLUSTRATIVE CASES.

[13] Edison v. Edison Polyform Manufacturing Co., 73 N. J. Eq. 136, 67 Atl. 392.

on account of the publication of the name and picture of the plaintiff, an infant, in a newspaper advertisement of jewelry, wherein the plaintiff's right was upheld;[14] an action for the publication of the plaintiff's likeness in a newspaper advertisement of coats for autoists, wherein the right was denied;[15] and an action for the publication of a deceased person's likeness as a label to a brand of cigars, wherein it was held that the deceased's family had no cause of action.[16]

On the other hand, only a few cases have arisen in which the plaintiff has complained of the unauthorized use of his picture, when the publisher was not seeking to exploit his business or goods thereby. In one of these cases, there was the project to erect the statue of a deceased woman as an ideal of human philanthropy; the objections of her relatives were overruled in the court of last resort.[17] In a second case relatives of a deceased man objected to the publication of his likeness in an unauthorized biography, but relief was denied on the ground that the deceased had been a public man and had waived his right of privacy.[18] In a third case the likeness of a young woman was published in connection with a newspaper article dealing with the alleged criminal misconduct of her father; the existence of a common law right of privacy was denied.[19]

[14] Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076.
[15] Henry v. Cherry, 30 R. I. 13, 73 Atl. 97.
[16] Atkinson v. Doherty & Co., 121 Mich. 372, 80 N. W. 285.
[17] Schuyler v. Curtis, 147 N. Y. 434, 42 N. E. 22.
[18] Corliss v. E. W. Walker Co., 57 Fed. 434; 64 Fed. 280.
[19] Hillman v. Star Publishing Co., 64 Wash. 691, 117 Pac. 594.

8. **Case of Schuyler v. Curtis.**—It will conduce to a better understanding of the subject to take up separately each of the several cases in which the right of privacy has been directly involved. There was a project to erect the statue of Mrs. Mary Hamilton Morris Schuyler at the Columbian Exposition in Chicago to represent "woman as the philanthropist." In an action by her relatives to restrain the making and exhibiting of the statute, the first decision was in the Supreme Court of New York, at Special Term, 1891, when Justice O'Brien granted the injunction.[20] The ground of the decision was that it was shown that Mrs. Schuyler was not a public character, and that her relatives were therefore entitled to restrain what was to them improper and offensive publicity. This judgment was affirmed by the Supreme Court, General Term, 1892, by Van Brunt and Barrett, JJ., in an opinion written by the former.[21] Here the rule was laid down that a person, whether a private or public character, has a right to enjoin the making of his statue and its public exhibition, and in case he is dead, this right pertains to his relatives.

This judgment was followed at the Special Term of the Supreme Court in 1893.[22] In the opinion of Ingraham, J., the rule was declared that a court of equity, at the instance of a relative of a deceased person, will enjoin the making and placing on public exhibition of a statue of the deceased by unauthor-

[20] Schuyler v. Curtis, 15 N. Y. Supp. 787.
[21] Schuyler v. Curtis, 19 N. Y. Supp. 264.
[22] Schuyler v. Curtis, 24 N. Y. Supp. 509.

ized persons, when the relatives allege that such an exhibition will cause them pain and distress. When, however, this case reached the Court of Appeals in 1895, the judgment of the lower court was reversed.[23] It was there held that if any right of privacy, in so far as it includes the right to prevent the public from making pictures or statues commemorative of the worth and services of the subject, exists at all, it does not survive after death, and cannot be enforced by relatives of the deceased. In the course of his opinion, Peckham, J., said: "If the defendant had projected such a work in the lifetime of Mrs. Schuyler, it would perhaps have been a violation of her individual right of privacy, because it might be contended that she had never occupied such a position towards the public as would have authorized such an action by any one so long as it was in opposition to her wishes." Gray, J., dissented, saying in the course of his opinion: "I cannot see why the right of privacy is not a form of property, as much as is the right of complete immunity of one's person." While the judgment of the Court of Appeals was adverse to the claim set up, it did not disapprove of the general existence of a right of privacy, but only ruled that if a person had such a right, it ceased on his death.

9. **Case of Corliss v. Walker.**—In 1893 an application was made to Judge Colt, of the United States Circuit Court for the District of Massachusetts, by the widow and children of George H. Corliss to enjoin the publication and sale of a biographical

[23] Schuyler v. Curtis, 147 N. Y. 434, 42 N. E. 22.

sketch of Mr. Corliss, and from printing and selling his picture in connection therewith. Mr. Corliss had been a man of distinction in the technical world, and was especially well known as the builder of the great engine exhibited at the Centennial Exhibition in Philadelphia in 1876. The relief desired was sought solely on the ground that the publication was an injury to the feelings of the plaintiffs, and against their express prohibition. An injunction was refused as to the biography on the ground that Mr. Corliss had been a public man, in the same sense as authors or artists are public men; but an injunction was granted against the publication of the picture, on the ground that such publication would be in violation of the conditions on which the publisher had obtained a copy of the photograph.[24]

Subsequently, the injunction was dissolved on the ground that the particular copy of the photograph in the hands of the publisher had not been obtained under the conditions supposed, but in a perfectly lawful way, and that its publication would involve no violation of contract and no breach of trust or confidence. And it was held that Mr. Corliss, as a public character, had so far waived his right of privacy as not to be entitled himself while living, nor his family after his death, to prohibit the publication of his picture.[25] Judge Colt, in the course of his opinion, said: "Independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representa-

[24] Corliss v. E. W. Walker Co., 57 Fed. 434.
[25] Corliss v. E. W. Walker Co., 64 Fed. 280.

tion of his portrait in any form, that this is a property, as well as a personal, right, and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or of oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's books by his clerk."

10. **Case of Atkinson v. Doherty.**—It was held in the Supreme Court of Michigan in 1899, that the use of the name and likeness of a deceased person as a label for a brand of cigars could not be restrained by injunction, so long as such use did not constitute a libel.[26] This decision ostensibly goes on the broad ground that the right of privacy does not exist so as to prevent a person from publishing the picture of another without his consent. Inasmuch, however, as the person whose likeness was used in this instance was dead, we cannot say that this case decides more than the New York Court of Appeals held in Schuyler v. Curtis,[27] namely, that if there be a right of privacy, it dies with the person.

11. **Case of Roberson v. Rochester Folding Box Company.**—It appeared that lithographic likenesses of a young woman, accompanied with the legend, "Flour of the Family," were printed and extensively used by a flour milling company to advertise its goods. The declaration alleged that in consequence of the circulation of these lithographs the plaintiff's good name had been attacked, and that she had been greatly humiliated and made sick and obliged to

[26] Atkinson v. Doherty & Co., 121 Mich. 372, 80 N. W. 285.
[27] Schuyler v. Curtis, 147 N. Y. 434, 42 N. E. 22.

employ a physician. An injunction was prayed for against the further use of the likenesses and for damages. This case came before the Supreme Court of New York, Special Term, in 1900, Davy, J., and before the Appellate Division of the Supreme Court in 1891, Rumsey, McLennan, Spring, and Williams, JJ.[28] It was held that the plaintiff's right of privacy had been invaded and she might recover; and that if a right of property was necessary to entitle the plaintiff to maintain the action, the case might stand upon the right of property which every one has in his own body. This case coming before the Court of Appeals in 1902, the judgment was reversed.[29] This was the first time the question of the existence of a right of privacy came squarely before a court of last resort. Four justices of the court,

[28] Roberson v. Rochester Folding Box Co., 65 N. Y. Supp. 1109; 71 N. Y. Supp. 876.

[29] Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, LEADING ILLUSTRATIVE CASES. On April 6, 1903, the year following the decision by the Court of Appeals in the Roberson case, the New York Legislature enacted the following statute:

"An act to prevent the unauthorized use of the name or picture of any person for the purposes of trade.

"Section 1. A person, firm, or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait, or picture of any living person without having first obtained the written consent of such person, or if a minor, of his or her parent or guardian, is guilty of a misdemeanor.

"Section 2. Any person whose name, portrait, or picture is used within this State for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the Supreme Court of this State against the person, firm, or corporation so using his name, portrait, or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries maintained by reason of such use, and if the defendant shall have knowingly used such person's name, portrait, or picture in such manner as is forbidden or declared to be unlawful by this act, the jury, in its discretion, may award exemplary damages."

Parker, C. J., O'Brien, Cullen, and Werner, JJ., Parker, C. J., writing the opinion, ruled that the complaint set forth no cause of action either at law or in equity, or, in other words, that the right of privacy did not exist. Three of the justices, Gray, Bartlett, and Haight, JJ., Gray, J., writing the opinion, dissented. The minority maintained that there is a legal right of privacy, that the plaintiff had showed a flagrant violation of her right, and that the injunction should have been granted. This case is the leading one on the subject of the right of privacy.

12. **Same subject—Position of the majority.**—The ruling of the majority is on the facts of the case, where there is an unwarranted publication of the picture of another for advertising purposes; but inasmuch as it is easier to establish a violation of a right of privacy when one's portrait is used by another for commercial purposes, the decision necessarily goes the length of absolutely denying the existence of such a right under any circumstances. Chief Justice Parker's reasoning goes on that assumption. He says: "An examination of the authorities leads us to the conclusion that the so-called right of privacy has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided." The reasoning of the majority is, in substance, that there is no decided case either in this country or in England in which such a right is distinctly recognized; that every case that might be

relied on to establish the right was placed expressly upon other grounds, not involving the application of this right in any sense; that the right is not referred to by the commentators and writers on the common law or the principles of equity; that the existence of the right is not to be legitimately inferred from anything that is said by any of such writers; that a recognition of the existence of the right would bring about a vast amount of litigation; and that in many instances where the right would be asserted, it would be difficult, if not impossible, to determine the line of demarcation between the plaintiff's right of privacy and the well-established rights of others and of the public.

13. **Same subject—Position of the minority.**—Judge John Clinton Gray, in the course of his dissenting opinion, after the words quoted above in § 4, continues: "When, as here, there is an alleged invasion of some personal right or privilege, the absence of exact precedent, and the fact that early commentators upon the law have no discussion upon the subject, are of no material importance in awarding equitable relief. That the exercise of the preventive power of the court of equity is demanded in a novel case is not a fatal objection. But if it is to be permitted that the portraiture is to be put to commercial or other uses for gain by the publication of prints therefrom, then an act of invasion of the individual's privacy results, possibly more formidable and more painful in its consequences than an actual bodily assault might be. Security of person is as necessary as the security of property, and for

that complete personal security which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but against the display and use thereof for another's commercial purposes or gain. The proposition is to me an inconceivable one that those defendants may unauthorizedly use the likeness of this young woman upon their advertisement as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity. Such a view, as it seems to me, must have been unduly influenced by a failure to find precedents in analogous cases, or some declaration by the great commentators upon the law of a common law principle which would precisely apply to and govern the action, without taking into consideration that in the existing state of society, new conditions affecting the relations of persons demand the broader extension of those legal principles which underlie the immunity of one's person from attack." This is the leading judicial argument in America.

14. **Case of Pavesich v. New England Life Insurance Company.**—In this case, in 1905, it was held, by the Supreme Court of Georgia, all the justices concurring, that the publication of the picture of a person without his consent, as a part of an advertisement, for the purpose of exploiting the publisher's business, is a violation of the right of privacy of the person whose picture is reproduced, and entitles

him to recover, without proof of special damage.[30] Justice Cobb, who wrote the opinion, conceded that "prior to 1890 every adjudicated case, both in this country and in England, which might be said to have involved a right of privacy, was not based upon the existence of such right, but was founded upon a supposed right of property, or a breach of trust or confidence, or the like, and that therefore a claim to a right of privacy, independent of a property or contractual right, or some right of a similar nature, had, up to that time, never been recognized in terms in any decision. The entire absence for a long period of time, even for centuries, of a precedent for an asserted right should have the effect to cause the courts to proceed with caution before recognizing the right, for fear that they may thereby invade the province of the law-making power; but such absence, even for all time, is not conclusive of the question as to the existence of the right. The novelty of the complaint," the court argues, "is no objection, when an injury cognizable by law is shown to have been inflicted on the plaintiff. Where the case is new in principle, the courts have no authority to give a remedy, no matter how great the grievance; but where the case is only new in instance, and the sole question is upon the application of a recognized principle to a new case, 'it will be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago.'"[31]

[30] Pavesich v. New England Life Insurance Co., 122 Ga. 190, 50 S. E. 68, LEADING ILLUSTRATIVE CASES.

[31] Broom, Legal Maxims (8th ed.), p. 193.

15. **Same subject—Reasoning of the court.**—The court agreed that the right of privacy has its foundation in the instincts of nature. It was recognized in the Roman law. It is among the absolute rights of individuals proclaimed by Blackstone,[32] whose illustrations of what would be a violation of such absolute rights are not to be taken as exhaustive. It is to be included under the head of liberty, which embraces the right to live as one will, so long as one's will does not interfere with the rights of another or of the public. One person may desire to live a life of seclusion; another may desire to live a life of publicity; still another may wish to live a life of privacy as to certain matters and of publicity as to others. The right of privacy, like every other right that rests in the individual, may be waived by him or by one duly authorized. The existence of the waiver, whether express or implied, carries with it the right to an invasion of privacy only to such an extent as may be equitably necessary and proper in dealing with the matter which has brought about the waiver. The court explicitly approves and adopts the reasoning of Justice Gray's dissenting opinion in the Roberson case.[33]

16. **Case of Edison v. Edison Polyform Manufacturing Company.**—In this case the Court of Chancery of New Jersey, in 1907, held that an injunction would lie to restrain the use of one person's name by another as part of a corporate title and to re-

[32] 1 Blackstone, Commentaries, pp. 129, 134.

[33] Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, LEADING ILLUSTRATIVE CASES.

strain the use of his picture as a business advertisement.[34] Stevens, V. C., said this case resembled that of Roberson v. Rochester Folding Box Company,[35] and emphatically repudiated the doctrine upheld by the majority of the New York Court of Appeals. He admitted that the subject of personal privacy was attended with difficulty and that it was hard to draw the line with precision between what the court will restrain and what it will not restrain. Further, he asserted that there must be limits to the right of privacy. A man in public life may not claim the same immunity from publicity that a private citizen may. He agreed that injury to property in some form is an essential element of relief. But the insignificance of the right from a pecuniary standpoint does not always bar relief. The term, property right, too, is not to be taken in any narrow sense, and the tendency of equity in cases of this description should be to extend, rather than to restrict, the jurisdiction. "It is difficult to imagine a case in which preventive relief would be more appropriate than the present. In a perfectly unauthorized way a certificate falsely purporting to be made by Mr. Edison, and also false in fact, because the preparation is not compounded with all the ingredients of the formula, is put by a company bearing Edison's name upon every bottle of Polyform which it sells. That there may be no mistake as to who is intended, the certificate is ac-

[34] Edison v. Edison Polyform Manufacturing Co., 73 N. J. Eq. 136, 67 Atl. 392.

[35] Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, LEADING ILLUSTRATIVE CASES.

companied with a likeness." The New Jersey court lines up on the side favoring the right of privacy.

17. **Case of Henry v. Cherry.**—The Supreme Court of Rhode Island, in 1909, held that there is no common law right of privacy, entitling a person to recover damages for mental suffering caused by the publication of his picture as a part of a mercantile advertisement without his permission, although it exposes him to humiliation, and to the jeers and gibes of his friends.[36] The facts of this case are not unlike those of the Pavesich case,[37] which the opinion of Dubois, C. J., discusses and takes issue with. The conclusion of the court is based mainly upon the grounds that until the Pavesich case was decided, the right of privacy had never been admitted by a court of authority, that while something like the right of privacy, the right "to be let alone," had been judicially asserted in many cases, it had always been in connection with a right of property, or in cases in which slander or libel was the gist of the action, and that no property right was involved in the alleged right in the case in hand. The case is in accord with the Roberson case,[38] and squarely opposed to the Pavesich case.

18. **Case of Foster-Milburn Co. v. Chinn.**—The Court of Appeals of Kentucky, in 1909, held that a person is entitled to the right of privacy in respect to his picture, and that the publication of the likeness

[36] Henry v. Cherry, 30 R. I. 13, 73 Atl. 97.

[37] Pavesich v. New England Life Insurance Co., 122 Ga. 190, 50 S. E. 68, LEADING ILLUSTRATIVE CASES.

[38] Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, LEADING ILLUSTRATIVE CASES.

of a person without his consent as a part of an advertisement for the purpose of exploiting the publisher's business is a violation of the right of privacy, and entitles him to recover, without proof of special damages.[39] The court did not go farther into a discussion of this question, merely affirming its concurrence with the courts that hold that a person has a right of privacy and may vindicate the right when violated.

19. **The case of Munden v. Harris.**—The Kansas City Court of Appeals, in 1911, ruled that the right of privacy, though an intangible right, is a legal right, for an invasion of which the law gives relief in equity by injunction, and that such right extends to the unauthorized use by one person of the picture of another.[40] The Missouri court did not rest its decision in this case wholly upon an abstract right of privacy, but upon the further ground that the exclusive right to one's picture is a property right of value. Ellison, J., said that the main ground of division of opinion of courts in deciding the question of a right of privacy, is to be found in conflicting assertions as to the presence of a property right. "So, therefore, it appears that, if it can be established that a person has a property right in his picture, those who now deny the existence of a legal right of privacy would freely concede a remedy to restrain its invasion, for all agree that equity will forbid an interference with one's right of property."

[39] Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364.
[40] Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076.

20. **Case of Hillman v. Star Publishing Company.**—A newspaper published an article stating that a certain man, father of the plaintiff, had been charged with using the mails to defraud in selling land and would be arrested, giving the details of the fraudulent operations, and in connection with the article published a photograph of the members of the family, including the plaintiff, young daughter of the accused. The Supreme Court of Washington, in 1911, held that there was no such right of privacy as would sustain the action.[41] The plaintiff had been wronged, the court admitted, but the wrong was one which the court could not redress. The court said: "Although it is not contended in the briefs that any purpose was served by the publication of plaintiff's photograph—indeed, it was admitted in oral argument that a wrong had been done to plaintiff, as indeed it has—yet we find that plaintiff's case does not fall within any of the rules so far recognized by the courts, permitting a recovery for an invasion of a so-called right of privacy. The defense in this case is purely technical, a call to precedent as it has been established. A wrong is admitted, but it is said there is no remedy. We regret to say that this position is well taken."

21. **Case of Douglas v. Stokes.**—There had been born to the plaintiffs, twin-boy children, joined together from the shoulders down, and having certain organs in common. They died, and after their death the plaintiffs employed the defendant to take a photograph of the corpse in a nude condition. Con-

[41] Hillman v. Star Publishing Co., 64 Wash. 691, 117 Pac. 594.

trary to agreement, the defendant made several photographs which he retained, filing one in the copyright office of the United States, and obtaining a copyright therefor. The Court of Appeals of Kentucky held that the defendant's misuse of the negative by copyrighting constituted a violation of the parent's right of privacy in respect to the bodies of their children, for which he was liable in damages.[42] The court said: "The corpse of the children was in the custody of the parents. The photographer had no authority to make the photographs except by their authority, and when he exceeded his authority, he invaded their right. We do not see that this case can be distinguished from those involving the like use of the photograph of a living person, and this has been held actionable. The most tender affections of the human heart cluster about the body of one's dead child. A man may recover for any injury or indignity done the body, and it would be a reproach to the law if physical injuries might be recovered for and not those incorporeal injuries which would cause much greater suffering and humiliation."

22. **The remedial jurisdiction of equity.**—The conclusion of the court in the Roberson case[43] was based, to a large degree, on the statement that the case there presented was without precedent, either in law or equity. The court, while admitting that equity, in the beginning and early part of its administration, was made up of growth, case by case,

[42] Douglas v. Stokes, 149 Ky. 506, 149 S. W. 849.

[43] Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, LEADING ILLUSTRATIVE CASES.

each without precedent, being based merely on the conscience of the chancellor, asserted that there came a time when this growth ceased, and that what was formerly the personal conscience of the chancellor became a "juridical conscience," which would only permit relief to be administered in cases where it had been administered before, save in those instances "where there could be found a clear and unequivocal principle of the common law which either directly or mediately governs it, or which by analogy or parity of reasoning ought to govern it."

On the other hand, there is marked and positive dissent from the view that equity has become a rigid and inelastic science. Thus Lord Chancellor Cottenham said: "I think it the duty of this court [equity] to adapt its practice and course of proceeding to the existing state of society, and not by too strict adherence to forms and rules, established under different circumstances, to decline to administer justice and enforce rights for which there is no other remedy."[44] Likewise, Justice Peckham has observed: "It may be admitted that courts have power, in some cases, to enjoin the doing of an act, where the nature or character of the act itself is well calculated to wound the sensibilities of an individual, and where the doing of the act is wholly unjustifiable, and is, in legal contemplation, a wrong, even though the existence of no 'property,' as the term is usually used, is involved in the subject."[45]

And Justice Gray has used the following language:

[44] Wallworth v. Hoyt, 4 Myl. & C. 619 (Eng.).
[45] Schuyler v. Curtis, 147 N. Y. 434, 42 N. E. 22.

"That the exercise of the preventive power of a court of equity is demanded in a novel case is not a fatal objection. In the social evolution, with the march of the arts and sciences and in the resultant effects upon organized society, it is quite intelligible that new conditions must arise in personal relations, which the rules of the common law, cast in the rigid mold of an earlier social status, were not designed to meet. It would be a reproach to equitable jurisprudence, if equity were powerless to extend the application of the principles of common law, or of natural justice, in remedying a wrong, which, in the progress of civilization, has been made possible as the result of new social or commercial conditions. Sir Henry Maine, in his work on Ancient Law, has observed of equity that it is an agency 'by which law is brought into harmony with society,' and that it is one of the factors which operate in judicial evolution. Equity has neither fixed boundaries nor logical subdivisions, and its origin, both in Rome and in England, was that there was a wrong for which there was no remedy at law."[46]

23. **Whether a property right is involved.**—In some cases courts of equity have refused relief because they could find no property right involved. In other cases, courts have striven to uphold the equitable jurisdiction on the ground of some property right, however slender and shadowy; and as the courts feel driven to afford more adequate protection to personal rights, they lay hold of slight cir-

[46] Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, LEADING ILLUSTRATIVE CASES.

cumstances tending to show a technical property right.[47]

The Missouri court explains the property idea involved in claims of right of privacy in the following language: "Property is not necessarily a taxable thing any more than it is always a tangible thing. It may consist of things incorporeal, and things incorporeal may consist of rights common in every man. One is not compelled to show that he used, or intended to use, any right which he has, in order to determine whether it is a valuable right of which he cannot be deprived, and in which the law will protect him. The privilege and capacity to exercise a right, though unexercised, is a thing of value—is property—of which one cannot be despoiled. If a man has a right to his own image as made to appear by his picture, it cannot be appropriated by another against his consent. It must strike the most obtuse that a claim of exclusive right to one's picture is a just claim. One may have peculiarity of appearance, and if it is to be made a matter of merchandise why should it not be for his benefit? It is a right which he may wish to exercise for his own profit, and why may he not restrain another who is using it for gain? If there is value in it, sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?"[48]

24. **View that equity may intervene to protect personal rights.**—Some courts take a broader ground

[47] Vanderbilt v. Mitchell, 72 N. J. Eq. 910, 927, 67 Atl. 103.
[48] Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076.

and hold that equity is not restricted to the protection of property rights. The tendency to enlarge the jurisdiction of Chancery in the direction of the protection of personal rights is steadily manifesting itself. Relatives of a dead man have been granted an injunction against the removal of his body, the court expressly stating that no property right was involved.[49] The right has been recognized not to have private sketches[50] or non-literary letters[51] made public.

Sometimes the courts have based their decisions in these matters on a property right and sometimes on the ground of a breach of confidence. But "that they will forbid the breach of confidence committed in making public the letters or pictures means no more than that they recognize the right to keep them private, the real motive for their acting being to prevent the complainant from experiencing unpleasant notoriety; in the other instance, it is clear that they are not so much moving to protect any ownership in the ideas expressed as to defend the complainant from the public gaze."[52]

The New Jersey court has emphatically said: "If it appeared in this case that only the complainant's status and personal rights were thus threatened or thus invaded by the action of the defendants and by the filing of the false certificate, we should hold, and without hesitation, that an individual has rights,

[49] Pierce v. Proprietors of Swan Point Cemetery, 10 R. I. 227.

[50] Prince Albert v. Strange, 1 Macn. & G. 25 (Eng.).

[51] Woolsey v. Judd, 11 N. Y. Sup. Ct. 379; Gee v. Pritchard, 2 Swanst. 402 (Eng.); Baker v. Libbie, 210 Mass. 599, 97 N. E. 109.

[52] 21 Harvard Law Review, 54.

other than property rights, which he can enforce in a court of equity and which a court of equity will enforce against invasion, and we should declare that the complainant was entitled to relief."[53]

25. **Same subject.**—Justice Gray upholds the jurisdiction of a court of equity in privacy cases on the ground of a property right in the claimant. This property right he explains in the following words: "Property is not, necessarily, the thing itself which is owned; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing or in one's privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and as such entitled to the protection of the law. The protective power of equity is not exercised upon the tangible thing, but upon the right to enjoy it; and so it is called forth for the protection of the right to that which is one's exclusive possession, as a property right. * * * I think this plaintiff has the same property in the right to be protected against the use of her face for defendants' commercial purposes as she would have if they were publishing her literary compositions. Any other principle of decision, in my opinion, is as repugnant to equity as it is shocking to reason. * * * The right to grant the injunction does not depend upon the existence of property which one has in some contractual form. It depends upon the existence of property in any right which belongs to a person."[54]

[53] Vanderbilt v. Mitchell, 72 N. J. Eq. 910, 927, 67 N. E. 103.

[54] Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, LEADING ILLUSTRATIVE CASES.

And the New Jersey court says: "If a man's name be his own property, as no less authority than the United States Supreme Court says it is,[55] it is difficult to understand why the peculiar cast of one's features is not also one's property, and why its pecuniary value, if it has one, does not belong to its owner, rather than to the person seeking to make an unauthorized use of it."[56]

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[55] Brown Chemical Co. v. Meyer, 139 U. S. 540.

[56] Edison v. Edison Polyform Manufacturing Co., 73 N. J. Eq. 136, 67 Atl. 392.

LAW OF TORTS

PART IX

EXTRA-HAZARDOUS OCCUPATIONS —ACTING AT PERIL—INSURING SAFETY—MISCELLANEOUS

BY

GEORGE FITCH WELLS, LL.B., LL.D.*

CHAPTER I.

ACTING AT PERIL—GENERAL PRINCIPLES.

1. **General discussion of subject.**—It is a general rule of the law that one must so use his own personal or property rights as not to interfere with the similar rights of others, being expressed in the maxim: *Sic utere tuo ut alienum non laedas* (So use your own as not to injure another's property). It is upon this maxim that the law of torts, to a large extent at least, is based. But it is not every use of one's property, although such use may injure or inconvenience others more or less, that will fall within the operation of the rule. The law only deals with legal rights, and their violations, which are known as legal wrongs. By this is meant that the law does

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not concern itself with matters which are deemed to be wholly within the forum of the conscience.[1] Wherever there is a legal right, there is a corresponding duty on the part of every other person to respect that right; and if one who owes to another that duty of respecting some right in such other person has used his own rights or property in such a way as to violate that duty, then he has laid himself liable to be called upon to respond in damages for such violation of his duty.[2] It is not within the province and scope of this chapter to discuss that class of cases where one, although suffering a diminished use and enjoyment of his property, or compelled to undergo an inconvenience, has no redress because his injury is brought about by the exercise of a superior right in another; such conditions, known to the law as *damnum absque injuria* (damage without injury),[3] are more properly treated elsewhere. But we are here to consider the situation of one who, having no rights superior to those of his neighbor, still uses his property or permits it to be used so that it may or does injure the legal rights of others. Such person, so taking the chance of working an injury to his neighbor or the passer-by, is said to be acting at his own peril.

2. **Instances of acting at peril.**—Among the most familiar examples of one acting at his own peril, as outlined above, are: keeping or harboring a wild animal, or one of known vicious propensities; per-

[1] Cooley, Torts (student's ed.), p. 9.
[2] Same citation, pp. 2, 3.
[3] Same citation, p. 21; Bigelow, Torts (8th ed.), p. 39.

mitting one's domestic animals to stray or trespass; permitting animals entrusted to one's keeping to stray or trespass; starting a fire under such conditions that it may spread beyond control, and do injury; manufacturing, storing, or transmitting dangerous agencies, such as gas, electricity, and high explosives; collecting and storing water in large quantities; conducting blasting operations (under certain conditions); excavating so as to remove the adjoining landowner's lateral support; keeping one's premises, to which the public is invited, in a dangerous condition; maintaining on one's land a dangerous machine, pit, or structure, which may be attractive to children of immature judgment.

In addition to the foregoing instances of acting at peril, which will be treated more at length in the following pages, it should be stated that where one is in possession of his mental faculties, of the age of discretion, and has knowledge or opportunity to form an estimate of the dangers of any act which he is about to and does perform, he is said to have acted at his peril. Such an instance of acting at peril is usually spoken of, however, as "assumption of risk," and most frequently arises in connection with employments of a more or less hazardous nature, but it may also arise in the case of one who is a trespasser upon another's premises, or even in the case of one who is a licensee or guest.

3. **Same subject—Assumption of risk by employee.**—"The rule is now well settled that, in general, when a servant, in the execution of his master's business, receives an injury, which befalls him from

one of the risks incident to the business, he cannot hold the master responsible, but must bear the consequences himself."[4] The rule thus stated is said to be one of general public policy, resting both upon the implied contract that the servant, when he accepts the employment, also accepts and has in contemplation the incidental hazards that he will be subjected to in the employment, and upon the fact that he and his fellow-servants have a great deal to do with increasing or diminishing the hazards of the employment, and perhaps the further reason that any other rule would be so unreasonable and ruinous in its application as to make the transaction of business by the aid of employees too onerous to undertake.[5]

4. **Same subject—What risks are incident to the business.**—The risks which the servant is held to assume on acceptance of employment from the master are those ordinary and usual, open and obvious risks which are connected with the employment undertaken, in the manner and form in which it is being conducted by the master.[6] The servant cannot close his eyes to risks of the employment and afterwards complain of them, as he is held to assume all those which the exercise of ordinary care and prudence on his part would have discovered; but he is not obliged to go about scrutinizing, testing, or measuring to detect perils not obvious to the ordinary person and

[4] Cooley, Torts (student's ed.), p. 635; Crown v. Orr, 140 N. Y. 450, LEADING ILLUSTRATIVE CASES.

[5] Hutchinson v. Ry. Co., 5 Exch. 343 (Eng.); Priestly v. Fowler, 3 M. & W. 1 (Eng.).

[6] Rogers v. Leyden, 127 Ind. 50; Lucey v. Hannibal Oil Co., 129 Mo. 32. See subjects, LAW OF AGENCY and LAW OF FELLOW-SERVANT AND COMPENSATION, for further discussion.

about which he is not informed.[7] The servant also assumes and must bear the burden of perils subsequently arising, and which become known to him, and this is so whether such perils arise from defects and dangers ordinarily obvious or not. "If a servant, knowing that the master has neglected his duty and that he is thereby subject to dangers not incident to the employment, continues in the service, the increased danger becomes an incident of the service which he assumes, and, for an injury resulting therefrom, the master is not liable."[8]

But in some jurisdictions it is said "the law does not prescribe a rule so inflexible or unwise as that a servant must forthwith refrain from using a defective machine or appliance, or immediately quit the service of the master, upon the discovery of the defect in the machine or appliance, or that he is working by the side of a negligent fellow servant, upon the pain of conferring immunity upon the master for all liability for an injury incurred in consequence of such defect or incompetency. The true test in all such cases is, whether a person of ordinary prudence, acting with such prudence, would, under all the circumstances, have refused to incur the risk."[9] It is

[7] Johnston v. Oregon S. L. & U. N. R. Co., 23 Ore. 94; Flockhart v. Hocking Coal Co., 126 Ia. 576; Indianapolis, etc., Transit Co. v. Foreman, 162 Ind. 85; Balle v. Detroit L. Co., 73 Mich. 158.

[8] Skinner v. Central Vt. R. Co., 73 Vt. 336. Carey v. Sellers, 41 La. Ann. 500. In the last case it is stated: "However gross the fault of the master in subjecting the servant to the risk of injury from defective buildings, premises or appliances, yet where the servant knows the defects and dangers, and still knowingly and without protest consents to incur the risk to which he is exposed thereby, he is deemed to assume such risk and to waive any claim for damages against his master in case of injury."

[9] Norfolk, etc., R. R. Co. v. Ampey, 93 Va. 108.

essential to the assumption of risk by the servant, not only that he should know the defect out of which the danger arises, but that he should appreciate the danger, or that the danger should be manifest to a man of ordinary intelligence and experience in the line of work in which the servant is engaged.[10] Though the servant know of the defect, if he continue in the work, either because of the necessity of his position, as being on the road with an engine, or because of fear of punishment, or where the danger is not obvious and he continues by reason of the assurance of the master, or those representing him, that there is no danger in continuing to use the defective appliance, his continuance will not operate as an assumption of the risk.[11]

Where state or federal statutes require the adoption of new devices for the protection of the servant, which the master fails to adopt, and the employee, either ignorant of that fact or expecting daily compliance with the law, continues in the service with the old appliances, he is generally not held to assume the risk of injury therefrom.[12]

[10] Mullin v. Cal. Horseshoe Co., 105 Cal. 77; Myhan v. Louisiana, etc., Co., 41 La. Ann. 964; Montgomery Coal Co. v. Barringer, 218 Ill. 327; Anderson v. Clark, 155 Mass. 368. But an adult servant of ordinary intelligence is presumed able to comprehend dangers open and obvious to persons of ordinary understanding. Diesenrieter v. Kraus-Merkel Malting Co., 97 Wis. 279.

[11] Olney v. Boston, etc., R. Co., 71 N. H. 427; Eldridge v. Atlas S. S. Co., 134 N. Y. 187; Consolidated Coal Co. v. Wombacker, 134 Ill. 57; McKinnon v. Riter-Conley Mfg. Co., 186 Mass. 155; McKee v. Tourtellotte, 167 Mass. 69. Where the danger is open and patent, the assurance of the master will not prevent the servant from assuming the risk of injury by continuing to use the defective appliance. Wells & French Co. v. Kapaczynski, 218 Ill. 149; Toomey v. Eureka, etc., Co., 89 Mich. 249.

[12] Greenlee v. So. Ry. Co., 122 N. C. 977, 41 L. R. A. 399; Buehner Chair Co. v. Feulner, 164 Ind. 368; Narramore v. Cleveland, etc., Ry. Co., 96 Fed. 298; Monteith v. Kokomo, etc., Co., 159 Ind. 149.

5. **Same subject—Assumption of risk by trespasser, licensee, or guest.**—"Where mischief happens to a trespasser by reason of the defective or dangerous condition of the premises upon which he trespasses, he is very properly held to assume the risk, and no recovery can be had against the keeper of those premises. As it is commonly and somewhat more artificially put, the implied duty to prevent harm from unsafe premises does not exist in favor of a trespasser."[13]

The same doctrine which is applied to trespassers, or at least one very similar thereto, is also applied in the case of injuries to licensees, guests, and under some circumstances to servants. To quote again from Professor Street: "A doctrine very similar to that which is applied in the case of trespassers, but not

[13] Street, Foundations of Legal Liability (Tort), vol. I, p. 155. As instances, Professor Street cites the following cases:

"(1) Sullivan v. Boston, etc., R. Co., 156 Mass. 378: The plaintiff's intestate climbed upon the defendant's building to recover a ball with which he had been playing and which had lodged there. While so upon the building he came into contact with a live wire used to conduct electricity from the defendant's works to an adjoining building, and was killed. It was held that no action lay.

"(2) Reardon v. Thompson, 149 Mass. 267: The defendant dug a hole partly on his own premises and partly on the premises of a third person who consented to the digging. The plaintiff came along at night and fell in. The hole was not near enough to the regular path to constitute a nuisance or menace to those who were entitled to use the path. It was held that an action could not be maintained.

"(3) Lary v. Cleveland, etc., R. Co., 78 Ind. 323: The plaintiff, without invitation and as a mere intruder, entered upon the unenclosed premises of the defendant, upon which was a building of the defendant in a state of visible decay. While there, a sudden storm blew a fragment of the dilapidated building against the plaintiff, injuring him severely. The building had once been used as a freight house, but had been long since abandoned as a place of public business, and was not so situated with reference to any public way as to endanger travelers thereon. It was held, in an action for damages for injuries received, that the plaintiff could not recover."

See also Ryan v. Towar, 128 Mich. 463, LEADING ILLUSTRATIVE CASES.

quite so strict, is applied in the case of licensees, servants, and guests. These, it is held, assume all ordinary risk of getting hurt upon the premises of the licensor, master, or host. But they do not assume extraordinary risk such as is incident to a defect in the nature of a concealed trap. Practically, the law here seems to be a result of balancing considerations of justice and convenience. It is not unreasonable to hold that the licensee and servant should look out for themselves and that the visitor, by accepting hospitality, assumes the risk that his host is exposed to. * * * Thus, we may say that the law raises an implied assumpsit of risk on the part of the licensee, servant, or guest, in view of the benefit which accrues to these persons by reason of the license, employment, or entertainment. This benefit, with the corresponding detriment to the other party, supplies a sort of legal consideration for the implied assumpsit to bear the risk."[14]

[14] Street, Foundations of Legal Liability (Tort), vol. I, p. 157. As illustrating this doctrine as to licensees, servants and guests, see the following cases, also cited by Prof. Street: Ivay v. Hedges, 9 Q. B. D. 82 (Eng.); Wilkinson v. Fairrie, 1 H. & C. 633 (Eng.); Hounsell v. Smyth, 7 C. B. (N. S.) 731 (Eng.); Gautret v. Egerton, L. R., 2 C. P. 371 (Eng.). But see Campbell v. Boyd, 88 N. C. 129, where one who kept up a road for his own use and the use of the public knew of a defect in the road.

See subject, TORTS, Part III, NEGLIGENCE, for discussion of duty of landowner to trespassers and licensees.

CHAPTER II.

LIABILITY FOR ANIMALS.

6. **Liability of the owner or keeper of a domestic animal for its trespass.**—By the common law, it was the duty of the owner or keeper of a domestic animal to prevent it from straying from his own premises. Failure so to restrain it would therefore render him liable in trespass if the animal got upon a neighbor's premises. Moreover, this liability attached even though the owner or keeper of such animal had, as he supposed, safely enclosed his animals, unless they were set at large by some intermeddler.[15] Concerning the rule, Professor Street says: "* * * liability here is generally referred to the negligent keeping of the animals. And this is doubtless in a way true; for, though a man is absolutely responsible for damage done to or upon his neighbor's property if he lets his cattle escape, regardless of the care he may have used in keeping them, he cannot be held responsible if he is in no way at fault, as where a meddlesome third person interferes to turn his cattle out.

"The law here evidently proceeds on the idea that the mischievous propensity of cattle—a term, by the way, which includes horses and pigs—to do damage to realty in straying abroad, must be known of all

[15] Cooley, Torts (student's ed.), p. 338; Bigelow, Torts (8th ed.), p. 457; Wells v. Howell, 19 Johns. 385 (N. Y.), LEADING ILLUSTRATIVE CASES.

men. Knowledge of this mischievous quality is taken as a sufficient ground for making the owner responsible and therefore liable."[16] In this connection he cites, as instances of the rule, the cases of Ellis v. Loftus Iron Co.[17] and Barnes v. Chapin.[18] In the first case a stallion poked his head through the fence enclosing him, and bit a mare, injuring her. It was held that the owner of the stallion was liable for the resulting damage, the decision resting, probably, on the ground of the known propensity of stallions to bite; although there is also present an idea of trespass in getting beyond the line of the owner's property, and negligence, too, in failing to maintain a proper and sufficient fence.

In the Massachusetts case, one who turned his horse onto the highway, and allowed it to roam there, was held responsible for the damage resulting from its kicking a colt which was running along the road beside its dam.

This rule of the common law in England became a part of the common law in this country, and so remains unless modified by statute. In many of the states this common law rule has been embodied in statutes; and by these statutes, penalties have frequently been added to the old liability for trespass. In some states, on the other hand, statutes have been enacted requiring landowners to fence in their property, and providing that failure to maintain such statutory fence shall deprive the landowner of his right

[16] Street, Foundations of Legal Liability, vol. I, p. 52.

[17] Ellis v. Loftus Iron Co., L. R., 10 C. P. 10; 11 Moak 214 (Eng.); Simpson, Cases on Torts, p. 594.

[18] Barnes v. Chapin, 4 Allen 444 (Mass.).

to sue for damages caused by the trespass of straying animals.[19] But such, it is believed, is not the general rule.

Where the owner or keeper rightfully has his animals in the highway, and without his fault or negligence they escape from his control, he is not liable for their trespass, providing he remove them as soon as he reasonably can do so. But it has been held "this exemption extends only to lands abutting upon the highway. If animals escape without fault and go upon abutting lands and from thence upon other lands, the latter is a trespass for which the owner of the animals is liable."[20]

7. **Liability of owner or keeper of wild or vicious animal for injuries.**—While it is the general rule that one owning or keeping domestic animals must keep them from straying, as we have seen, yet the rule is not quite so strict as it is regarding one who keeps wild or vicious animals. In the latter case, the keeper of such animals is bound to take into account their wild and vicious nature, and the law makes him practically an insurer against harm by them.[21] Such animals are kept at peril, as it is matter of universal knowledge that their natures are such as to make them highly dangerous to mankind. The strictness of the rule may be realized by a remark of an English judge to the effect that, if a man kept a tiger and lightning broke his chain, and the tiger got loose and did harm, the owner would probably be

[19] Cooley, Torts (student's ed.), p. 341.

[20] Cooley, Torts (student's ed.), pp. 342, 343; Street, Foundations of Legal Liability, vol. I, p. 53.

[21] May v. Burdett, 9 Q. B. (N. S.) 101 (Eng.).

held liable.[22] It may be questioned, however, if the modern tendency of the law would be to hold to such strict liability; the trend of authority, it would seem, is toward relieving the owner on the ground that the tiger's escape was due to the act of God.

The strict rule of liability as to wild animals is somewhat relaxed in the case of the owner or keeper of bees. But their propensities must be regarded by their keeper, and in an Iowa case it was held that to place the beehives within twenty-five feet of hitching posts in the highway would render one liable for injury to a horse, stung by the bees, while he was hitched at such post.[23]

The rule of liability for keeping wild animals is practically the same as to one who keeps a so-called domestic animal of known vicious tendencies. The gist of an action for damages for injuries inflicted by a vicious animal, says Judge Cooley, "is not negligence in keeping the animal, but the keeping him with knowledge of his vicious propensity,"[24] although in a number of states the courts have held the owner liable on the ground of negligence in keeping the vicious beast. But the weight of authority is as stated. The owner of a dog will not be liable for injuries done by it, unless it be shown that such owner had knowledge of the viciousness in the dog; such animals being harmless ordinarily. The same would be true regarding horses.[25]

[22] Nichols v. Marsland, L. R., 10 Exch. 255 (Eng.).

[23] Cooley, Torts (student's ed.), p. 350; Parsons v. Manser, 119 Ia. 88, 93 N. W. 86, 97 Am. St. Rep. 283, 62 L. R. A. 132, and note.

[24] Cooley, Torts (student's ed.), p. 345.

[25] Street, Foundations of Legal Liability, vol. I, p. 54; Bigelow, Torts (8th ed.), p. 458.

"When damage is done by animals upon the owner's premises, a different question, or set of questions, may arise. The case will ordinarily turn upon negligence, and negligence of a special kind, to wit, with reference to the occupancy of the premises. The place where the damage was done may enter into the case; a bull may well be left at large in the owner's field, while a savage dog should not be. And then the character in which the person hurt entered upon the premises will have to be considered in determining the question of duty. Such person may have been 'invited' to enter; he may have been a trespasser; he may have been a mere licensee. The owner of premises obviously owes a duty to persons whom he induces to come there for his benefit, to wit, that they may do so safely so far as his own conduct is concerned; while towards others his duty may be very different. And in all these cases there may be a question of the effect of notice by the occupant, or knowledge by the person injured, of the state of things."[26]

It is frequently a question whether the owner has had knowledge of the viciousness of his animal, and the general rule is that the notice must be such as to show the animal was likely to do the particular harm that was done. But notice that the animal has a propensity to do one kind of mischief, as that a dog worries sheep, has been held not to be notice to the dog's owner that it will attack human beings. So, too, notice that a horse is fractious will not impute knowledge that he will kick or bite. On the other

[26] Bigelow, Torts (8th ed.), p. 459.

hand, notice that a bull attacks and injures other animals is notice that he will also attack persons. The rule, as stated by an eminent authority,[27] is: "The question in each case is whether the notice was sufficient to put the owner on his guard, and to require him to anticipate the injury which has actually occurred. It is not necessary that it be notice of mischief actually committed; it is the propensity to commit the mischief that constitutes the danger. And if the mischief is of a sort that animals of the kind are likely to commit at a certain season of the year—as in the case of stallions—the owner should anticipate and guard against it without any special notice or warning."

The case of Hayes v. Smith[28] will illustrate the liability of the owner for injuries caused by a vicious dog. The heirs of the late President Hayes kept upon the old homestead premises a watchdog, savage and vicious as to strangers and passers-by. The animal was usually kept chained or tied, but on the day of the injury was at large upon the premises. A Mrs. Smith was driving along the highway on one side of the Hayes premises, and the premises, on that side at least, were enclosed by a fence sufficiently high to keep an ordinary dog from the roadway. But the Hayes dog made his way over or through the fence as Mrs. Smith drove by, and bit her horse on the nose, frightening him so that he became unmanageable (the horse was ordinarily gentle and safe

[27] Cooley, Torts (student's ed.), p. 346; Reynolds v. Hussey, 64 N. H. 64, LEADING ILLUSTRATIVE CASES.

[28] Hayes v. Smith, 62 Ohio St. 161, 56 N. E. 879.

for a woman to drive), and Mrs. Smith was severely injured. It was shown that the owners of the dog knew it had on previous occasions rushed alongside the same fence, barking ferociously and trying to reach those traveling along the road, but it was not shown that the dog had ever before succeeded in escaping from the premises to the highway. The court held the owner of the dog liable for Mrs. Smith's injuries, but placed its decision upon the ground of negligence in not properly restraining the dog, rather than upon the general rule of liability for harboring a vicious animal, irrespective of negligence.

No distinction has been made in this treatment of the subject between the liability of the owner or keeper for the trespass, and for the damage other than trespass, of animals. There is little, if any, difference in the rules of law fixing the liability in either case. In those states which have not adopted the reformed procedure, actual knowledge of the vicious tendencies of an animal would call for a remedy by action on the case, rather than by action for trespass.

CHAPTER III.

LIABILITY FOR INANIMATE FORCES.

8. **General principles.**—It is a general rule of law that a man must so conduct himself, and so use his property, as not to infringe upon the legal rights of others. Whenever he fails so to observe and respect the rights of other people, whether that failure take form as a positive act, or negatively, by omitting to act when it becomes his duty to act, or by putting into operation a chain of consequences which he can not or does not control, and which work injuriously to his fellow-men, he is liable, and must respond in damages. With reference to the last-mentioned act of negligence, it should be noted that, in order to render one liable in damages, it is not necessary that the initial act be illegal, in and of itself. But if that act be followed by consequences such as an ordinarily prudent or reasonable man would expect under the surrounding circumstances, then liability will attach for the damages resulting from such consequences. This was exemplified in the case of the owner of domestic animals permitting them to stray upon the highway. In the same fashion, and following a similar line of reasoning, the courts have declared him liable who collects or sets in motion inanimate forces which escape from his control and do harm. It is of such agents of harm, and the liability therefor, that this chapter will treat.

9. **Liability for damage by fire.**—Very early in the history of English law, the courts developed a rule holding one upon whose premises a fire started liable for damages due to its escape. And this rule was applied even in the case of one whose servant or guest had started the fire, or where its start had been due to pure accident.[29] This rule took no account of the care or negligence exercised by the owner of the premises, but made him an insurer as to fire; if a fire started upon his property, no matter how, he must control and keep it there, or suffer the consequences. But this very strict, and undoubtedly harsh, rule has been modified by statute or by judicial interpretation, or both, so that today, at least in this country, the question of liability for fire is a question of negligence. As in many other instances of negligence, the degree of care required of one who starts a fire or permits it to be started is correspondent to the danger involved. Thus, one who starts a fire must do so "at a proper time and in a suitable manner, and use 'reasonable care and diligence to prevent its spreading and doing injury to the property of others. The time may be suitable and the manner prudent, and yet if he be guilty of negligence in taking care of it, and it spreads and injures the property of others in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these particulars, and an injury is done in consequence thereof, the liability attaches, and it is immaterial whether the proof

[29] Street, Foundations of Legal Liability, vol. I, p. 56.

establishes gross negligence or only want of ordinary care on the part of the defendant.'"[30] And of course if one starts a fire when the conditions are unsuitable, as in a high wind, or among quantities of very inflammable stuff, though he use his utmost endeavors to prevent it from spreading, he will be liable for resulting damage, because he was negligent in the time or manner of starting the fire.

How far one may be chargeable with the spread of fire negligently started by himself, is a question that has attracted no little attention in judicial circles, and led to some difference of opinion. In New York it is held that while the culpable party would be liable to the owner of an adjoining house to which the fire had spread, he would not be liable to one to whose house the fire should spread from the burning of the first; the court apparently being more influenced in their decision by the fact that the opposite doctrine "would subject to a liability against which no prudence could guard, and to meet which no private fortune would be adequate," than by a strict regard to the logic of cause and effect.[31] In Pennsylvania the same conclusion has been reached, and from similar considerations.[32] But a different view prevails in England and in most of the American states. The negligent fire is regarded as a unity; it reaches the last building as a direct and proximate result of the

[30] Cooley, Torts (student's ed.), pp. 741, 742, and citing Hewey v. Nourse, 54 Me. 256.

[31] Ryan v. N. Y. Cent. R. R. Co., 35 N. Y. 210; Read v. Nichols, 118 N. Y. 224.

[32] Penn. R. R. Co. v. Kerr, 62 Pa. St. 353, 1 Am. St. Rep. 431. But in some cases the question of proximate cause is left to the jury. See Penna. R. R. Co. v. Hope, 80 Pa. St. 373.

original negligence, just as a rolling stone put in motion down a hill, injuring several persons in succession, inflicts the last injury as a proximate result of the original force as directly as it does the first; though if it had been stopped on the way and started anew by another person, a new cause would thus have intervened back of which any subsequent injury could not have been traced. Proximity of cause has no necessary connection with contiguity of space or nearness in time.[33]

Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow.[34]

But, as Judge Cooley points out,[35] "there must be some evidence which will warrant imputing the injury to the negligence or misconduct of the defendant or his servants, and the burden is upon the plaintiff to make this showing. The plaintiff makes out this part of his case by showing that the fire was kindled when and where it would be likely to spread as it did, or pass beyond control, or that it was left without proper care afterwards."

The question as to liability for fire frequently arises in the case of those using steam machinery. The general rule will apply in these, as in other instances. If the use of the steam machine was lawful,

[33] Cooley, Torts, pp. 86, 88.
[34] Christianson v. Chicago, etc., Ry. Co., 67 Minn. 94.
[35] Cooley, Torts (student's ed.), p. 742.

and the owner was within his legal rights in so using it at that time and place, he will not be liable for fire so started, unless negligence can be shown. But if the plaintiff shows that the fire might have been prevented by the use of spark arresters, or that the machinery was out of repair, and by reason thereof it was likely to scatter sparks of fire, he has shown negligence in the operation of the machinery.[36] So if a railway locomotive sets fire to the premises located along the railroad track, it has many times been held in this country that a presumption arises of failure on the part of the railroad company to use the best-known equipment to prevent fire, and so makes out a prima facie case of negligence.[37] And where the railroad company permits dry, inflammable materials to lie along the track, where they may take fire and so communicate it to the adjoining fields, it is held to be negligent. But it is not contributory negligence for the adjoining owner to leave grass or grain upon his land, near the railroad track, for the duty of preventing fires rests upon the company, and not on him. In many states the duty of railroad companies, as to fires from their engines, and their liability therefor, is very fully set forth in, and regulated by, statutes.[38]

"If the plaintiff sets a back fire to protect his property from an approaching fire due to the defend-

[36] Cooley, Torts (student's ed.), p. 743.

[37] Piggot v. East Counties Ry., 3 C. B. 229 (Eng.); I. C. R. R. Co. v. Mills, 42 Ill. 407; Brusberg v. Ry. Co., 55 Wis. 106; L. & N. R. R. Co. v. Marbury Lumber Co., 125 Ala. 237, 28 So. Rep. 438, 50 L. R. A. 620. But see, contra, Burroughs v. R. Co., 15 Conn. 124; Sawyer v. Davis, 136 Mass. 239; Lyman v. Boston & W. R. Corp., 4 Cush. 288 (Mass.).

[38] Cooley, Torts (student's ed.), pp. 744, 746.

ant's negligence, and the two unite and burn his property, the liability of the defendant depends upon whether the plaintiff's property would have been burned if the back fire had not been started. And where, in such a case, the united fires burned the property of a third party, the proximate cause of the loss was held to be the original fire, and not the back fire."[39]

10. **Liability for damage from fire-arms.**—A very strict rule of liability is imposed upon one who uses, or controls the use of, fire-arms, for the reason that they are highly dangerous, and their dangerous character is well known to all persons. The rule of law is the same as with regard to dangerous machinery, namely, that one using, or responsible for the use of, the dangerous instrument is held bound to use such degree of care as is proportioned to the likelihood of injury to others from such use. That, in the case of fire-arms, would be a very high degree of care, especially if they were used in the vicinity of other people. And this is so even though the one held responsible for the injury did not use the fire-arm himself: if he was the real cause of the fire-arm being in the hands of some irresponsible person he will be held liable for the indiscretion and carelessness of the irresponsible one.[40]

As an illustration, take the case of Dixon v. Bell,[41] quoted by Professor Street.[42] There the plaintiff and the defendant were both lodgers of one Leman, and

[39] Cooley, Torts (student's ed.), p. 745.
[40] Same, p. 746; Street, Foundations of Legal Liability, vol. I, p. 57.
[41] 5 M. & S. 198 (Eng.).
[42] Foundations of Legal Liability, vol. I, p. 58.

the defendant kept a gun loaded at his rooms, because of recent robberies in the neighborhood. Being away from the house, the defendant sent his servant, a mulatto girl about fourteen years old, for the gun, with a message to Leman to take the priming out and let her have the gun. Leman took out the priming and gave the gun to the girl, telling her he had taken out the priming. She put the gun down, but soon took it up again, and playfully pointed it at the plaintiff's son, younger than she, saying she would shoot him. She pulled the trigger and the piece was discharged, injuring the boy seriously. Some of the priming had been left, probably. The court held the defendant liable for the injury, on the ground that he was chargeable with the negligence of Leman, whom he had made his agent for the purpose of seeing that the priming was removed and the gun made safe for children to handle; and he was also blamed for sending a young and indiscreet person for the gun.

The case may seem to lay down a harsh rule, but it is sound in reason and in principle, and stands undisputed in authority.

Another instance of the strict liability imposed on one using or handling fire-arms is found in the case of Langridge v. Levy,[43] decided some twenty years after Dixon v. Bell. Levy was a gun dealer, and sold to plaintiff's father a gun. The purchaser told the dealer the gun was for the use of himself and his two sons. Defendant represented that the gun was of a well-known make of excellent quality, knowing this statement to be false. The gun was

[43] 2 M. & W. 519 (Eng.).

inherently defective, and exploded in plaintiff's hands, and the gun dealer was held liable for the resulting injury.

11. **Liability for damage from explosives.**—The rule as to explosives, such as powder, gas, dynamite, steam, and the like, is much the same as that concerning fire-arms; and those who use any of these highly destructive agencies must exercise a high degree of care in such use, or respond in damages for any resulting loss. And if such instrumentalities are so kept as to make their very keeping a nuisance, the keeper will be held to be an insurer; that is, absolutely liable for all damage done thereby.[44]

Negligently leaving explosives near pathways or other places frequented by children may involve a liability for damages. Thus, where a train employee left an unexploded torpedo, not needed at that place for signaling, at a crossing, and it was picked up by a boy nine or ten years old, who was injured by its exploding while he was investigating it, the railroad company was held liable, although the employee had no authority to leave the torpedo where he did.[45] But this rule of liability was not followed in a Massachusetts case, on the ground that the act of the employee in using the torpedo without authority was not within the scope of his employment; and where a torpedo was found by a boy along the railroad track, at some considerable distance from any sta-

[44] Hazard Powder Co. v. Volger, 58 Fed. 152; Wilson v. Phœnix Powder Mfg. Co., 40 W. Va. 413; Hay v. The Cohoes Company, 2 N. Y. 159, LEADING ILLUSTRATIVE CASES.

[45] Harriman v. P. C. C. & St. L. R. Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. R. 507; Euting v. Ry. Co., 116 Wis. 13, 92 N. W. 358, 96 Am. St. R. 936, 60 L. R. A. 158.

tion or crossing, and the boy was injured by its exploding, the company was held not liable, on the ground that it was not under duty to keep its track safe for trespassers.[46]

It has been held, and is the general rule, that one who sells to another explosives for the purpose of resale, and fails to tell such purchasing dealer of their dangerous nature, will be liable to the ultimate consumer who is injured by them, not knowing their explosive character. So, too, where explosives are given to a messenger or carrier for transportation, without giving notice of the dangerous character of the package, the one so delivering the explosives will be liable for injuries resulting from an explosion. But if the carrier is informed of the nature of the package, and the same is so marked as to indicate its dangerous character, the shipper will be relieved from responsibility for damages. But the carrier cannot be charged with negligence in handling the package in the usual manner of handling similarly appearing packages, if no notice is given of its dangerous character, and there is nothing about the package or its markings to arouse suspicion.[47]

If one has stored high explosives in a place and manner usually safe as to such explosives, and they are set off by lightning, no liability attaches; but where one keeps explosives so that such keeping

[46] Obertoni v. Boston & M. R. Co., 186 Mass. 481, 71 N. E. 980, 67 L. R. A. 422; Hughes v. Boston & M. R. Co., 71 N. H. 279, 51 Atl. 1070, 93 Am. St. R. 518.

[47] Street, Foundations of Legal Liability, vol. I, pp. 59, 60; Cooley, Torts (student's ed.), p. 748; Standard Oil Co. v. Tierney, 92 Ky. 367, 17 S. W. 1025, 36 Am. St. R. 595, 14 L. R. A. 677; Nitroglycerine Case, 15 Wall. 524 (U. S.).

amounts to a nuisance, it has been held that the mere fact that the explosion was caused by lightning was no defense.[48]

So, one who employs steam boilers in the conduct of his business is held to a very high degree of care in their use, the rule being the same as in the case of other dangerous agencies; but no liability attaches unless the user of the steam boiler has failed to use adequate care; that is, care commensurate to the degree of danger involved in the use of such boiler.[49]

12. **Liability for damages from poisons.**—The same strict rule of liability applies here as in the conditions previously mentioned. If one puts into the course of trade things which are dangerous in their effects, as poisons which are not so labeled as to indicate their true character, he will be held liable to one injured thereby. This liability is placed on the ground of negligence in dealing with things dangerous per se, although Professor Street suggests that the liability "is perhaps also referable to the idea of breach of implied warranty." Where the retail druggist sells patent medicines as called for, and in the original package, which bears the label of the one who put it up, he is not liable for its ill effects. But if a retailer opens a package obtained from a wholesale druggist, and wrongly labeled, and sells the contents of the package in small lots, he will be held liable, on the ground that he has had opportunity

[48] Prussak v. Hutton, 30 App. Div., 66 N. Y.

[49] Marshall v. Welwood, 38 N. J. L. 339; Losee v. Buchanan, 51 N. Y. 476; Olive v. Whitney Marble Co., 103 N. Y. 292, 8 N. E. 552; Snodgrass v. Carnegie Steel Co., 173 Pa. St. 228, 33 Atl. 1104; Veith v. Hope Salt & Coal Co., 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410.

to examine and see that the article sold is not that which it is claimed to be. So, too, a druggist who fails to clean his pestle and mortar after grinding up poisonous drugs, will be held liable for ill effects resulting to one buying from him another article, harmless in itself, but which has been made injurious by being ground in the poisoned mortar.[50]

13. **Liability for damages from electricity or gas.** —Electricity is another impalpable and dangerous force, and those who make, sell, or handle it are held to the use of the greatest care to avoid injuring those who must come and go where it is employed. Here again the rule is that the care must be proportioned to the danger to be avoided. "Electricity is a silent, deadly, and instantaneous force, and one who uses it for profit is bound to exercise care corresponding to the dangers incident to its use."[51] Hence, in the use of the public streets for electric wires, charged with this dangerous element, the companies are bound to exercise the greatest of care, and a broken or fallen wire, charged with electricity, raises a presumption of negligence on the part of the owner of the wire.[52] In a case where a store was destroyed by reason of the crossing of the wires of a telephone company and an electric railway, it was held on suit against the railway company that both it and the telephone company were bound to guard against the

[50] Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Sutton's Admr. v. Wood, 120 Ky. 23, LEADING ILLUSTRATIVE CASES; Loop v. Litchfield, 42 N. Y. 351. See also subject, TORTS, Part III, NEGLIGENCE.

[51] Rowe v. Taylorville Elec. Co., 213 Ill. 318, 322.

[52] Newark, etc., Co. v. Ruddy, 62 N. J. L. 505; Braun v. Buffalo Gen. Elec. Co., 200 N. Y. 484, LEADING ILLUSTRATIVE CASES.

contact of their wires by the exercise of a high degree of care, and for a failure in this respect either one was liable, irrespective of the question whose wires were installed first.[53] In such cases the liability is joint and several.[54]

Akin to electricity is natural or artificial gas, and those manufacturing or dealing in it are held to a high degree of care because of its dangerous characteristics. For any negligence or failure to exercise due care to inspect its mains and apparatus used in distributing this commodity, or for failure to discover leaks in time to save life or property, where it is its duty to do so, the company will be liable.[55] So it must observe care in turning off and on gas, and in repairing leaks in its fixtures or pipes.[56] And a gas company was held liable in tort for the sickness and death of an invalid where they had shut off the gas in cold weather from the house in which he was living, without giving warning.[57]

[53] Richmond, etc., Elec. Ry. Co. v. Rubin, 102 Va. 809.

[54] Cumberland, etc., Co. v. Ware's Admx., 115 Ky. 581.

[55] Heh v. Consolidated Gas Co., 201 Pa. St. 443.

[56] Ferguson v. Boston Gas Light Co., 170 Mass. 182; Schmeer v. Gas Lt. Co., 147 N. Y. 529; Dow v. Gas Co., 69 N. H. 312; Beyer v. Con. Gas Co., 44 App. Div. 158, 60 N. Y. Supp. 628.

[57] Hoehle v. Allegheny Heating Co., 5 Pa. Supr. Ct. 21; see also Coy v. Indianapolis Gas Co., 146 Ind. 655, where the company were held liable for failing to keep up the supply where there were sick children, whereby they had a relapse and died.

CHAPTER IV.

LIABILITY FOR INJURIES FROM LAWFUL USE OF ONE'S LAND.

14. **As to waters.**—(1) *Waters artificially collected.* "If one collects water on his land by artificial means, and it thereafter escapes and flows on other land, to its injury, through his negligence, whether by percolation, the bursting of a dam, or otherwise, he is unquestionably liable for injury occasioned thereby on other land. By the English decisions and those of a few states in this country, the owner of land who thus collects water thereon is liable as an insurer for injuries caused by its escape, even though he has been free from negligence, on the principle that he who brings anything on his lands which is liable to do mischief must keep it there at his peril. In the majority of the states, however, there is no such liability, in the absence of negligence."[58] The rule here, as in case of other

[58] 1 Tiffany, Real Property, p. 666. The English rule was laid down in the celebrated case of Rylands v. Fletcher, L. R., 3 H. L. 330 (Eng.), LEADING ILLUSTRATIVE CASES, as follows: "We think the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." This rule was very soon subjected to two exceptions: (1) When the escape was due to the act of God or the inevitable forces of nature, the defendant was not liable. Nichols v. Marsland, L. R. 10 Exch. 255 (Eng.). (2) When the escape was due to the interference of third persons over whose conduct the defendant had no control, he was not liable. Box v. Jubb, L. R. 4 Exch. Div. 76 (Eng.).

inanimate things, being that such degree of care as is proportionate to the degree of danger attendant upon such accumulation of water is required, and no more.

(2) *Drainage of waters naturally deposited.* This is a subject upon which the decisions of the various courts of review in this country are by no means in harmony; but they may, for the present purpose, be grouped into two classes. What is known as the "civil law rule" has received sanction in Alabama, California, Illinois, Louisiana, North Carolina, Michigan, Ohio, Pennsylvania. Under this rule, one owning higher ground has the right of drainage onto the land of the lower proprietor. But under the so-called "common law rule" (which Mr. Tiffany suggests is a misnomer, "since there appears never to have been any direct decision on the subject in England"), the owner of land has his full and ordinary right to make any use whatever of his land, without taking any regard to the effect it may have upon his upper neighbor's drainage. This gives one the right to change the surface of his land, or to erect structures thereon, even though it may cause water which would naturally flow upon his land to collect or flow upon the lands of another. This rule has been sustained in New York, Massachusetts, New Jersey, Wisconsin, New Hampshire, Minnesota, Iowa, Kansas, Missouri, Vermont, Connecticut, Indiana. Under the operation of either rule, the landowner will, if damage results, be liable if he collects water by artificial means and then throws it in greatly enhanced volume upon his lower neighbor; although

he may dig ditches or other conduits to facilitate the natural flow of surface water upon his land.[59] As to underground waters, the landowner owes no duty concerning such as percolate below the surface in no known channel, and hence he may drain or appropriate them to any extent he pleases, even though he thus deprives his neighbor of his previous water supply. But if the underground water is known to be flowing in a well-defined course or channel, the landowner will be liable in damages if he diverts such underground stream, or uses larger amounts of the water than is necessary for his ordinary domestic purposes.[60]

(3) *Pollution of waters.* Tiffany says: "Though the proprietor of land may appropriate or divert the water percolating through or from his land into the land of another, he has no right to pollute it in any way, to the injury of another landowner, his duty being, if he pollutes it by the discharge of sewage or otherwise, to keep the water in its polluted state upon his own land."[61] For failure to observe such duty, he must respond in damages to the one so injured. And what is true of the pollution of underground waters is also true of surface waters, and of streams. With reference to these, the upper landowner may use them in a reasonable manner, not only for domestic but also for business purposes, provided the stream is large enough so that the lower proprietors' rights in the water are not impaired;

[59] 1 Tiffany, Real Property, p. 664.
[60] Same, p. 667; Acton v. Blundell, 12 M. & W. 324 (Eng.).
[61] 1 Tiffany, Real Property, p. 667.

but the business must not so pollute the stream as to deprive the lower owners of their use of it.[62]

15. **As to support of land.**—One who so excavates his land as to remove from the adjoining land its natural support, and such adjoining land is thereby injured, will be held liable in damages. It should be noted, however, that liability is due to removing the natural support of the adjacent land, not to failing to keep the soil in its natural state; and so, if one excavates his land and provides artificial support for the land of his neighbor, he will then not be held liable.

This rule as to support of land is applicable to both lateral and subjacent support; except that as to the latter, in some states where one grants to another "all the coal" or the right "to remove the coal" under the grantor's land, the grantee has no duty resting upon him to shore up or support the surface of the land. But that is the exception, rather than the general rule.[63]

16. **As to nuisances from use of land.**—What was said above concerning the pollution of watercourses is also applicable to the pollution of the atmosphere by smoke, dust, gases, odors, and the like. Mere inconvenience of the neighbors is not sufficient to charge one with liability for polluting the atmosphere; it must be more than that, and amount to interference "materially with the ordinary comfort, physically, of human existence, according to the

[62] Cooley, Torts (student's ed.), p. 596; Hauck v. Tidewater Pipe Line Co., 153 Pa. St. 366, LEADING ILLUSTRATIVE CASES.

[63] 1 Tiffany, Real Property, pp. 668-672; 1 Street, Foundations of Legal Liability, pp. 191-198.

modes of living of ordinary people."[64] Such use of one's land constitutes a nuisance, and will not only render the landowner liable in damages, but he may also be required to either change the manner of conducting such business, or even to abandon it altogether in that locality. So, too, such a use of one's land as produces loud and continuous noises, especially late at night, heavy jarring and constant vibrations from the operation of machinery on one's land, may be such as to render him liable for the resulting injury to comfort and to health. It would be impossible to give a complete list of the uses of land which might render the owner liable, but some of the more familiar are: conducting slaughter-houses, tanneries, soap factories, distilleries, livery stables (in residence localities), contagious disease hospitals, billiard or pool rooms, or merry-go-rounds (late at night), chemical and other similar works, factories using heavy machinery such as trip hammers.[65]

[64] Cooley, Torts (student's ed.), p. 602.
[65] Cooley, Torts (student's ed.), pp. 602-606.

CHAPTER V.

JOINT TORT-FEASORS.

17. **What constitutes a joint wrong.**—A joint wrong or tort is one in which more than one person has participated in the wrongdoing and has thereby become liable for the damage resulting. It is pointed out that some torts are in their nature individual, while others, as conspiracy, are joint, because several are required to accomplish them.[66] In such case, it is said a civil action cannot be brought unless something is done which, without the conspiracy, would give a right of action. That is, the damage is the gist of the action, and not the conspiracy; but, the conspiracy having been formed, the person injured has a right of action against all persons participating in the conspiracy, though not otherwise connected with the wrong. The wrong being independent of the conspiracy, a recovery may be had against all actual participants in such wrong, though the proof of the conspiracy fails, or a recovery may be had against the single individual directly responsible for the wrong.[67]

The fact of participation may be established in various ways. "One may plan, another may procure men to execute, others may be the actual instruments in accomplishing the mischief, but the legal

[66] Cooley, Torts (student's ed.), p. 85.

[67] Patten v. Gurney, 17 Mass. 182; Lasher v. Littell, 202 Ill. 551; Beechley v. Mulville, 102 Ia. 602.

blame will rest upon all joint actors."[68] So the consenting to or ratification of what has been done by others may make one a participant.[69] But mere silent approval of an unlawful act, or the expression of gratification that it has been accomplished, is not sufficient.[70]

In order to adopt or ratify the action of a wrongdoer so as to become liable thereunder, the person ratifying must have had some interest or benefit in the original act. As expressed by Lord Coke, the principle is: "He that agreeth to a trespass after it is done is no trespasser, unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment. The adoption must be clear and founded upon a full knowledge of the tort committed."[71] "In order to charge an absent party with the commission of a trespass, it is necessary to prove something more than the fact that he in some way received the fruits of the trespass. There must be evidence of a *scienter*—evidence tending to show that he received the fruits of the trespass with a guilty knowledge—with the knowledge that they had been procured from the land of another by a trespass."[72]

A party to a suit is regarded as directing all that the officer is required to do by the writ or process, but if the process is legal it protects both the officer and party from liability under it. The party is not

[68] Cooley, Torts (student's ed.), p. 86.
[69] Brannock v. Bouldin, 26 N. C. 61; Hubbard v. Hunt, 41 Vt. 376.
[70] 4 Inst. 317; Beveridge v. Rawson, 51 Ill. 504.
[71] Tucker v. Jerris, 75 Me. 184.
[72] Holliday v. Jackson, 30 Mo. App. 263.

responsible for anything the officer may do which is a departure from the writ, unless he advises or assists therein, and his mere opinion that the steps are warranted by law is not sufficient to make him liable.[73] Some cases hold that the party is liable if he knows what has been done under the writ, and approves of it and seeks to take the benefits from such action.[74] Where the party gives the officer a bond of indemnity against the consequences of the action taken, this is a ratification of it.[75]

So an attorney acting for a party and procuring the writ for the officer to execute does not make himself liable for any acts of the officer outside of the command of the writ. But if the writ is illegal, then the attorney becomes liable as a joint trespasser with the officer for the acts done under it.[76] The party for whom he acts is also identified with the wrongful act under an illegal writ so as to become liable for it; but it is otherwise if the writ is not consented to, or authorized, by him.[77]

When the writ or process is served by a deputy, the rule is that the officer is still liable for all illegal acts of the deputy done under color of his appointment, and the deputy is also personally liable to the person injured by such acts.[78] A mere neglect or nonfeasance on the part of the deputy makes the officer alone liable to an action.[79]

[73] Hyde v. Cooper, 26 Vt. 552.
[74] Root v. Chandler, 10 Wend. 111 (N. Y.).
[75] Herring v. Hoppock, 15 N. Y. 409.
[76] Johnson v. Bouton, 35 Neb. 898.
[77] Barker v. Braham, 3 Wils. 368 (Eng.).
[78] Whitney v. Farrar, 51 Me. 418.
[79] Buck v. Ashley, 37 Vt. 475.

18. **Joint liability for joint wrongs.**—Whether or not a joint liability attaches to all who may have participated in committing a wrong, is not always an easy question to answer. It should be borne in mind, however, that it is not necessary to sue all the joint tort-feasors, even though the injured one has that right. The plaintiff may, if he so desire, sue any one of the joint wrongdoers, without impleading the others. In other words, a tort always gives rise to a several liability as to those participating in it; and it may also give rise to a joint as well as a several action; except, possibly, where the husband must be joined in an action for the tort of the wife. Where several persons unite in doing an act, intending the results, or do it under such circumstances that they will be held to have intended the results, they are each held liable to the full extent of the injury done; the reason being that the party injured has not assented to their action, as in case of a joint contract, but has suffered injury at the hands of several under circumstances which would hold any of the persons if the act had been done by one, and he is not obliged to apportion his injury among the wrongdoers, but may follow his remedy in the most convenient form, or in whatever way it may appear most to his interest to select. So if one of the wrongdoers is sued, he cannot compel the joining of the others, or complain if part are sued and others omitted.[80] "Whatever may have been the reason for proceeding at first against less than the whole, it is conceded on all sides that a previous suit against one or more

[80] Berkson v. Kansas, etc., Co., 144 Mo. 211.

is no bar to a new suit against the others, even though the first suit be pending, or have proceeded to judgment, when the second is brought. The second or even a subsequent suit may proceed until a stage has been reached in some one of them at which the plaintiff is deemed in law to have either received satisfaction or to have elected to rely upon one proceeding for his remedy, to the abandonment of the others."[81] So when separate actions are brought for a joint trespass, plaintiff can recover against one or more, though others be acquitted, and if separate judgments be obtained, he may make his election to take the larger judgment or pursue the solvent party, but when the election is once made he is concluded. This is a privilege of which he cannot be deprived. He can have only one satisfaction, but the judgment satisfied must be the one he has elected to take.[82]

Just when the plaintiff will be presumed to have made his election on which of the several claims or judgments to rely so as to bar him from proceeding on any of the others, is in controversy. The New York rule announced by Justice Kent is that there is no bar to the proceedings on any of the judgments until satisfaction is received on some one of them,[83] while the English rule, which is followed in some states, is to the effect that a judgment in a suit against one of the wrongdoers is a bar to any further action

[81] Cooley, Torts (student's ed.), p. 100; San Antonio Gas Co. v. Singleton, 24 Tex. Civ. App. 341.

[82] Power v. Baker, 27 Fed. 396; Roodhouse v. Christian, 55 Ill. App. 107; DuBose v. Marx, 52 Ala. 506. In the last case it was held plaintiff could bring different forms of action against the several parties.

[83] Livingston v. Bishop, 1 Johns. 290 (N. Y.); Elliott v. Hayden, 104 Mass. 180; Wright v. Lathrop, 2 Ohio 33; Cushing v. Hederman, 117 Ia. 637.

against the others.[84] Again, it is held in some jurisdictions that if an execution is sued out on a judgment against a joint trespasser it is a bar, as it shows a final election, so that the others would be discharged.[85] But a satisfaction of one judgment does not bar the collection of the costs in the others, which may be enforced by execution.[86] A satisfaction or release of one is a release of all the joint trespassers, and this is so although the release expressly stipulates in so many words that the other defendants shall not be released.[87]

Where an injury may be charged to several persons by reason of the failure to observe some contractual duty, and the act or omission does not amount to a positive wrong, only the person who assumed to perform the duty is chargeable for the neglect. Thus in the case of a common carrier, it is usually the servants of the carrier to whose neglect the injury is attributable, but the action is against the carrier, as the contractual relation is with him alone.[88] Yet if the servant does a positively wrongful act he becomes liable to the party injured irrespective of contract.[89] One may become responsible personally, or jointly with his employer, where he has failed to act with such vigilance and prudence as is required by

[84] Brinsmead v. Harrison, L. R., 6 C. P. 584 (Eng.).

[85] Fleming v. McDonald, 50 Ind. 278.

[86] First Nat. Bank v. Piano Co., 45 Ind. 5; Ayer v. Ashmead, 31 Conn. 447.

[87] Chetwood v. California Nat'l Bank, 113 Cal. 414; Ellis v. Bitzer, 2 Ohio 89; Aldrich v. Parnell, 147 Mass. 409; Chicago, etc., R. R. Co. v. Hines, 82 Ill App. 488. In the last case it was held that a mere acceptance of money from a joint tort-feasor will not discharge the others if there is no satisfaction or release.

[88] Richardson v. Kimball, 28 Me. 463.

[89] Burnham v. Grand Trunk R. R. Co., 63 Me. 298.

the nature and responsibility of the position he holds.[90]

19. **Same subject—How the joint liability may be determined.**—One's connection with a tort or wrongful act in combination with others is established in the same way as his connection with it would be established if he alone were responsible for its commission; he may have an actual hand in its commission, or simply direct or advise the act as done by the hand of another, or, being interested in the act done, subsequently ratify the same. As stated by a Vermont court, "All who aid, advise, command, or countenance the commission of a tort by another, or who approve of it after it is done, are liable, if done for their benefit, in the same manner as if they had done the act with their own hands; and proof that a person is present at the commission of a trespass without disapproving or approving of it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance, and approved it; and was thereby aiding or abetting the same."[91] So, in an action of tort, the fact that one acted as agent or servant or at the request of another, will be no defense; neither will the fact that he is acting as a trustee or public officer.[92]

"In respect to negligent injuries, there is considerable difference of opinion as to what constitutes

[90] Hutchinson v. Ry. Co., 5 Exch. 343 (Eng.); Johnson v. Barber, 10 Ill. 425.

[91] Mack v. Kelsey, 61 Vt. 399; Mason v. Copeland & Co., 27 R. I. 232, LEADING ILLUSTRATIVE CASES.

[92] Blue v. Briggs, 12 Ind. App. 105.

joint liability. No comprehensive general rule can be formulated which will harmonize all the authorities. The authorities are, perhaps, not agreed beyond this, that where two or more owe to another a common duty and by a common neglect of that duty such other person is injured, then there is a joint tort with joint and several liability. The weight of authority will, we think, support the more general proposition, that, where the negligences of two or more persons concur in producing a single, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design, or concert of action."[93]

Again, it is said: "If two or more persons owe to another the same duty, and by their common neglect of that duty he is injured, doubtless the tort is joint, and upon well-settled principles, each, any, or all of the tort-feasors may be held. But when each of two or more persons owes to another a separate duty, which each wrongfully neglects to perform, then, although the duties were diverse and disconnected, and the negligence of each was without concert, if such several neglects concurred and united together in causing injury, the tort is equally joint, and the tort-feasors are subject to joint and several liability."[94] So where two persons negligently passed the plaintiff on motorcycles, one on each side, frightening his horse and injuring him, both were held liable.[95] And where two separate fires were set by different

[93] Cooley, Torts (student's ed.), p. 92; Railway Company v. Durand, 65 Kan. 380, LEADING ILLUSTRATIVE CASES.

[94] Matthews v. Delaware, etc., R. R. Co., 56 N. J. L. 34.

[95] Corey v. Havener, 182 Mass. 250.

individuals, which, uniting, destroyed the plaintiff's property, the two persons were held to be jointly liable.[96] But where the dogs of different owners unite in doing damage, a joint action against the owners cannot be maintained.[97]

A servant, though in the conduct of the master's business, makes himself liable jointly with the master for his tortious acts committed while conducting the business. He is liable for the wrongful act because it is his duty to abstain from injuring others; the master is liable because he is chargeable with the servant's acts within the scope of the service or agency, and they are both liable jointly because the relation of master and servant identifies them as being connected with the wrongful act.[98] So the act of a partner in connection with the partnership business, resulting in injury, charges all of the partners jointly and severally for his act, except, perhaps, where the same is malicious.[99]

20. **Assessment of damages against joint tort-feasors.**—"If the injuries caused by the concurrent acts of two persons are plainly separable, so that the damage caused by each can be distinguished, each would be liable only for the damage which he caused; but if this is not the case, all the persons who con-

[96] McClellan v. St. Paul, etc., R. R. Co., 58 Minn. 104.

[97] Nierenberg v. Wood, 59 N. J. L. 112; Dyer v. Hutchins, 87 Tenn. 198. And where several persons located on a stream of water, each, in conducting his own separate business, contributed refuse and filth to the stream, it was held that they were not jointly liable. Chipman v. Palmer, 77 N. Y. 51; Gallagher v. Kemmerer, 144 Pa. St. 509.

[98] Schumpert v. Southern Ry. Co., 65 S. C. 332, 338.

[99] Miller v. Phenix Ins. Co., 109 Ill. App. 624; Austin v. Appling, 88 Ga. 54; Hess v. Lowrey, 122 Ind. 225, 7 L. R. A. 90.

tribute to the injury by their negligence are liable, jointly or severally, for the whole damage. It is immaterial how many others have been in fault, if the defendant's act was the efficient cause of the injury. Therefore, in an action against one who, by negligence, inflicted an injury which would naturally cause death, it is no defense to show that the injured person was so unskillfully treated as to hasten his death, or that by proper treatment his life would have been saved."[1] And what is true of those who have been jointly negligent to the injury of another is much more so if the injury was caused intentionally by two or more.

The burden of proving the amount of damages which should be assessed is upon the plaintiff and must not be left to mere guess-work. But if, through no fault of the plaintiff, it is impossible to accurately show the damage and the amount must, in part at least, be left to the estimation of the jury, the wrongdoers cannot complain of the amount of the verdict unless it be so great as to show passion or prejudice.

As exemplary damages are recoverable only where actual malice animated the wrongdoer, it follows that where the injured one elects to sue all the joint tort-feasors, he cannot have exemplary damages unless all have acted from bad motives. To recover exemplary, as well as compensatory, damages, the plaintiff must sue such one or ones as have been actuated by malice, and no others. The only exception to this rule would be that where plaintiff has no choice of suing severally but must join all the defend-

[1] Shearman & Redfield, Negligence, § 31.

ants, as in a case where the husband must be joined in a suit for the wife's tort, then exemplary damages may be assessed against both defendants.[2]

21. **Contribution and indemnification between joint tort-feasors.**—Though the party injured by the joint wrong of several persons may single out one particular individual and hold him responsible for all the damage sustained, it does not follow that this individual may have an action against the others for contribution. Since it is a maxim that no man can make his own misconduct the ground for an action in his own favor, the law leaves the wrongdoer upon whom the loss falls without legal redress against his associates in the wrong.[3] But this rule has its limitations, and there are cases where the person who has borne the loss may have contribution or indemnity from the others. In an English case it is said: "The rule that the wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act."[4] While in cases where there was no previous intent to injure, and the circumstances are not such as to show that injury must follow the doing of the act, or where the party is made chargeable with the conduct of others by reason of his relation, there may be contribution.[5]

But there is no implied obligation to contribute be-

[2] Hale, Damages (1st ed.), p. 209.

[3] Pearson v. Skelton, 1 M. & W. 504 (Eng.).

[4] Adamson v. Jarvis, 4 Bing. 66, 73 (Eng.). See also Johnson v. Torpy, 35 Neb. 604; Jacobs v. Pollard, 10 Cush. 287 (Mass.).

[5] Spaulding v. Oaks, 42 Vt. 343; Bailey v. Bussing, 28 Conn. 455.

tween tort-feasors, and if such liability can be created by express promise the promise must rest upon some other consideration than the fact of the tort and of the relation of the accused parties to each other in the guilty transaction. So, an agreement by a prisoner with an officer to the effect that if the officer will allow him his liberty, he will appear at the trial or else pay the debt out of which the imprisonment sprung, is void, and the officer, though accepting the promise and letting the prisoner go, cannot recover indemnity from the prisoner on the promise.[6]

An extension of the same principle denies the right of recovery to one who is engaged in the commission of a tortious act in conjunction with others, and while so doing is injured through the negligence of some of the participators. Thus in the case of rioters, or smugglers, where one of them is injured unintentionally by the others while conducting the nefarious business, there can be no recovery, since, as has been stated, "In all the cases supposed, the party injured must undertake to trace his injury to the negligence of the other; but in doing so he will show that at the time he was engaged in an unlawful action, and that it was only because of such action that the opportunity was afforded for the negligent injury. The injury, therefore, is as directly traceable to his own breach of the law as to the negligence of his associate; each has combined to produce it, and without both it could not have occurred. What the plaintiff must ask, therefore, must be this: That the law shall relieve him from the consequences of his dis-

[6] Pitcher v. Bailey, 8 East 171 (Eng.); Nichols v. Nowling, 82 Ind. 488.

regard of the law; and this it will refuse to do."[7] In a few of the New England states this principle has been invoked to deprive one traveling on Sunday from recovering for negligent injuries suffered at the hands of common carriers, since in those states such traveling violates a statute against travel on that day, except for purposes of necessity or charity. And in these states, unless the traveler can bring himself within the exceptions he cannot recover.[8] The rule has been abrogated in some of the states by statute, and in others its soundness denied.[9]

22. **Effect of release of or settlement with one joint tort-feasor.**—"If the injured party accepts a satisfaction voluntarily made by one joint wrongdoer, it will work a discharge of all the others. And so a release of one releases all, although the release expressly states that the other defendants shall not be released."[10] The author just quoted states that this rule also holds where the one released is not in fact liable; but this doctrine is, in many states, disaffirmed.[11] It is probable that the weight of authority, at the present time, is against releasing tort-feasors by reason of a release of one not legally liable.

But in order to discharge other wrongdoers than

[7] Wallace v. Cannon, 38 Ga. 199; James v. Campbell, 5 C. & P. 372 (Eng.).

[8] Bosworth v. Swansey, 10 Met. 363 (Mass.).

[9] Acts, 1895 Me., C. 129; Sutton v. Wauwatosa, 29 Wis. 21.

[10] Cooley, Torts (student's ed.), p. 102.

[11] Release of one not liable releases all: Miller v. Beck, 108 Iowa 575, 79 N. W. 344; Hubbard v. St. L. & M. R. R. Co., 173 Mo. 249, 72 S. W. 1073; Seither v. Philadelphia Tract. Co., 125 Pa. St. 397, 17 Atl. 338, 11 Am. St. R. 905, 4 L. R. A. 54; Contra: Thomas v. Central R. R. Co., 194 Pa. St. 511, 45 Atl. 344; Kentucky & Indiana Bridge Co. v. Hall, 125 Ind. 220, 25 N. E. 219; M. K. & T. R. R. Co. v. McWherter, 59 Kan. 345, 53 Pac. 135; Pickwick v. McCauliff, 193 Mass. 70, 8 Anno. Cas. 1041.

the one making payment it must be shown that the person injured received the settlement in full satisfaction of the damages sustained; a mere acceptance of money, not accompanied by a release or satisfaction, does not operate to discharge any of the tort-feasors, except the one so paying it; but the receipt of such money can be shown in mitigation of damages as to the others. So, too, an agreement not to sue any of the tort-feasors, given to one of them for a consideration, is not a discharge of the others, unless satisfaction or release of the whole claim be shown.[12]

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[12] Cooley, Torts (student's ed.), p. 103.

LAW OF FELLOW-SERVANT AND COMPENSATION

BY

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CHAPTER I.

THE MASTER'S DUTIES TO THE SERVANT—FELLOW-SERVANT DOCTRINE.

1. **Scope of article.**—The general subject of Principal and Agent, or, as it is also called, Master and Servant, has been considered elsewhere.[1] There will be found a discussion of the nature of the relation, how it arises, and what are the rights and liabilities of the master and the servant to each other and to third parties.

The purpose here is to discuss in detail the duty of the master to his servant in regard to the conditions under which the servant works, the meaning of the fellow-servant doctrine, and purpose and effect of the modern statutory changes prescribing compensation for workmen injured while engaged in work.

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[1] See subject, LAW OF AGENCY.

2. **Master's liability for act of servant—General rule.**—As explained elsewhere,[2] the law is well settled that when a person employs another to perform services for him under his direction and control, he is liable to third parties for any damages which such employee may inflict by reason of improper conduct in the course of his employment. If A chooses to have his work done for him by B and B negligently performs such work and thereby injures a third person, A is liable to such person for the damages thus inflicted. This rule is usually stated in the form of a maxim, *respondeat superior,* which means, in this connection, let the master respond in damages.

This rule, "let the master answer," is founded essentially upon grounds of public policy. He who chooses to do his work by the hand of another is responsible to third parties who may be injured by such other in the course of his doing the work.

3. **Same subject — Exception — Fellow-servant rule.**—The rule stated in the foregoing section has a well-defined exception, usually known under the name of the fellow-servant rule. This doctrine, in short, means that, while the master is liable to third persons for the negligence of his servant, he is not liable to his own servant for injuries inflicted by the negligence of such servant's fellow-worker. In other words, the maxim, *respondeat superior,* does not apply when one servant of a common master injures by his own negligence a fellow-servant.

This rule originated in the United States in 1841, in the case of Murray v. South Carolina Railroad

[2] See subject, LAW OF AGENCY.

Company.[3] The reason for the rule that the master is liable to third parties for the negligence of his servant has been stated to be one of public policy and expediency. Likewise, the reason for the exception to the rule, that is, the fellow-servant doctrine, is one of public policy and expediency. The courts, however, have not always put it in this form. It is usually stated that when the servant enters the employment of a master, he assumes the risks incident to the employment, and that among those risks are injuries caused by the negligence of fellow-workmen.[4]

[3] McMullan's Law, 385 (S. C.).

[4] Examples of risks assumed by a servant are given in the following extract from Cooley, Torts (2d ed.), p. 1051: "Trainmen take the risk of a low bridge over the track, and of posts, poles or other structures or obstructions near thereto, if they know, or by the exercise of ordinary care might know, of their existence. 40 N. J. L. 23; 52 Ia. 276; 125 Mass. 79; 104 Ind. 88; 196 U. S. 51. But other cases hold that a servant does not assume the risk of obstructions near the track unless he knows not only of their existence in a general way, but also of their dangerous proximity to the track. 214 Ill. 124; 124 Ia. 48; 98 Me. 61; 23 Ore. 94; 71 Tex. 700. A railroad servant assumes the risk of unblocked guard rails or frogs. 49 Mich. 466; 36 Kan. 129; 147 Mass. 604. So of an unguarded ash pit, of which he has knowledge. 111 Ky. 822; 27 S. C. 71. So of a car loaded with projecting rails or logs, 101 Pa. St. 1; of handling disabled cars being taken to the repair shop, 32 Minn. 54; 110 Ind. 18; of cars with double deadwoods, and generally of defective appliances of which he is aware. 147 U. S. 238; 119 Pa. St. 301; 107 Mich. 540. So of smoke and gases in a tunnel. 75 Md. 152. One employed to shovel snow from the tracks at a distance from any dwelling takes the risk of injury from frost while so employed. 23 R. I. 583. Trainmen do not take the risk of an unsafe track. 67 N. J. L. 636; 123 N. C. 280; 135 Mich. 95. One employed about a mill or factory assumes the risk of unguarded machinery with which he is familiar, or which is patent to ordinary observation. 35 Kan. 292; 135 Mass. 398; 66 Mich. 277; 71 Mo. 66. So of the danger of falling earth in excavating, or of falling rock in a quarry. 53 Wis. 661; 53 Kan. 731. A servant whose duty it is to repair electrical lines takes the risk of defective poles and crossarms, of defective insulation of the wires, or of defective insulation of the wires of another company in dangerous proximity to the line he is repairing. 97 Md. 620; 126 Ia. 241; 107 Tenn. 392; 176 Mass. 125. So one employed to take

This reason for the fellow-servant rule is well stated in Farwell v. Boston, etc., Railroad Corporation:[5] "The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services."

It is also sometimes said that by the contract of employment the servant does not stipulate for any case of action against his master for injuries suffered by the acts of fellow-servants. Thus, as stated in the case above referred to, the master is not liable "because the implied contract of the master does not extend to indemnify the servant against the negligence of anyone but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract expressed or implied."

A further reason for not allowing the servant to recover for injuries due to fellow-servants is that the injured servant himself is really to blame for his own

down decayed and unsafe poles takes the risk of their falling. 74 Minn. 163. As a general rule, a servant cannot recover for any injury caused by the very defect which he is employed to repair. 74 Minn. 163. An employee in a store takes the risk of slipperiness of marble stairs with which she is familiar. 178 N. Y. 377. Where the master keeps a dangerous dog and the servant knows of his vicious propensity, he takes the risk if he continues in the service. 78 Hun. 560 (N. Y.). A servant employed in a white lead factory assumes the risk of injury from the lead. 30 App. Div. 205; 51 N. Y. Supp. 602."

[5] 4 Met. 49 (Mass.), LEADING ILLUSTRATIVE CASES.

injuries. "We are of opinion that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents, as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrongdoer."[6]

The application of the fellow-servant rule is confined to cases of injuries inflicted by those who are really servants of a common master and who were at the time of the injuries engaged as servants in the common employment. It is important, therefore, to determine who are fellow-servants and what constitutes common employment.

4. **Who are fellow-servants.**—No clear and specific definition that will cover all cases can be given of a fellow-servant, or that will universally indicate

[6] Farwell v. Boston, etc., Railroad Corp., 4 Met. 49 (Mass.), LEADING ILLUSTRATIVE CASES.

just who are and who are not fellow-servants. Thompson on Negligence[7] gives the general rule as upheld by the weight of adjudged cases, "that all who serve a common master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow-servants who, under the rule under consideration, are deemed to take the risk of each other's negligence." The servant injured and the one at fault must necessarily be fellow-servants employed by a common master and engaged in the same service; the latter term narrows the application of the rule. All persons engaged in common service or employment are fellow-servants, when each of them is occupied in service of such a kind that the others, in the exercise of ordinary sagacity, ought to foresee, when accepting their employment, that his negligence would probably expose them to injury. They must be employed by the same master, engaged in the same common work and be performing duties for the same general purpose.[8] The definition of fellow-servants is a question of law for the court; whether a given case falls within that definition is a question of fact, to be determined by the jury under proper instruction.[9]

5. **Fellow-servants in railroad service.**—In the railroad service some special rules prevail as to who are and who are not fellow-servants. Beginning with

[7] § 4917. See Mast v. Kern, 34 Ore. 247, LEADING ILLUSTRATIVE CASES.
[8] Laning v. N. Y. Cent. R. Co., 49 N. Y. 521.
[9] Chicago etc. R. v. Swan, 176 Ills. 424; Lake Erie etc. R. v. Middleton, 142 Ill. 550.

Chicago, etc., Railway Company v. Ross,[10] the Federal Supreme Court decided that a railway train conductor was a vice-principal, representing the company, and not a fellow-servant with the same train's engineer. This decision has since been modified by the same court holding them fellow-servants. Many state courts, following the earlier decision, hold that the conductor is not a fellow-servant of the other employees on the train, and allow the latter to recover for the former's negligence, against the common master. But the better rule is said to be that the conductor is a fellow-servant with the other employees on the same train, and that all such employees are fellow-servants with respect to each other, while engaged in the operation and handling of the train; thus, engineer and brakeman; engineer and fireman; brakeman and fireman; engineer, fireman, brakeman and shovelers; and two engineers of two engines attached to the same train; and the employees on different trains operated by the same company, are held to be fellow-servants.[11] So, also, those who load cars and whose duty it is to see that they are properly loaded, and those who move them. It is now generally held that a railway employee assumes the risk of negligence in any department and that the whole business of the railroad must be regarded as a single enterprise.[12]

6. **Same subject.**—A baggageman and engineer; Pullman porter, conductor and engineer; and the

[10] 112 U. S. 377, modified in New England R. Co. v. Conroy, 175 U. S. 323.
[11] Meyer v. Illinois etc. R., 177 Ill. 591; Oakes v. Mase, 165 U. S. 363.
[12] Northern Pacific R. v. Hambly, 154 U. S. 349.

train crew and those who repair and inspect the cars and engines; a train dispatcher and those on the train whose movements he governs, are not fellow-servants.[13] Where one railway company runs its cars over the tracks of another, the latter's employees are not fellow-servants of the former's employees.

A conflict of authority exists as to whether or not a station agent or local telegraph operator and those in the train service; a section foreman and the men under him; trainmen and track repairers, are, respectively, fellow-servants.[14] A "student" or "cub" brakeman and a freight train crew are considered fellow-servants.[15] A third person concurring with a fellow-servant in injuring plaintiff cannot invoke the fellow-servant doctrine as a defense.[16]

7. **Fellow-servants in other employments.**—Outside the railway service, the following cases occur: the assistant foreman of a cotton mill machine shop and the foreman of its slashing room; a foreman in charge of a gang of men, under the supervision of a general superintendent, and the men under him, were held, respectively, fellow-servants; but not so as to a foreman having entire charge of the work or plant, or a foreman discharging a positive duty owing by the master.[17] In the following cases the employees are not fellow-servants: A sawyer having charge of saw and machinery for handling logs, and the men

[13] Marsh v. Lehigh etc. R., 206 Pa. St. 558; Hankins v. Railroad Co., 142 N. Y. 416.

[14] Northern Pacific R. v. Dixon, 194 U. S. 338; Justice v. Pennsylvania Co., 130 Ind. 321.

[15] Louisville etc. R. v. Vincent, 116 Tenn. 317.

[16] Kentucky etc. R. v. Sydnor, 119 Ky. 18.

[17] Cooley, Torts (2d ed.), pp. 1083-84.

working with him; one engaged to repair a mill and those working in the mill; the gas inspector or tester of a mine and the miners; one who inspects rafted logs for pikes and those who put the logs on the carriage to be sawed.[18]

All employees of the same master engaged in erecting a building, though doing different lines of work, as carpentry, masonry, etc., have been held to be fellow-servants; all the persons composing a ship's company, divided into three classes: (1) the deck department, including officers, sailors, etc.; (2) the engineer's department, and (3) the steward's department, such division being merely a matter of convenience, are fellow-servants. But an employee on a lighter is not a fellow-servant of a seaman on a vessel employing the lighter. In general, all who are employed by the same master on any particular work, although there may be different ranks or different lines of work, or divisions into different gangs, are considered fellow-servants. But workmen of different contractors or masters who are working on the same building or job, or otherwise for the same proprietor on the same premises, are not fellow-servants.[19] Whether elevator operators are fellow-servants with others in the same building is disputed.[20]

8. **Rule in cases of transfer of service.**—The master who has immediate control of the servant will be the one responsible, so where the servants of one master are sent to work on the premises of another,

[18] Evans v. Louisiana Lumber Co., 111 La. 534.

[19] Morgan v. Smith, 159 Mass. 570; Moll, Independent Contractors, § 196.

[20] See note to Judd v. Letts, 158 Cal. 359, in 41 L. R. A. (N. S.) 156.

they are the servants of the latter while working under his control or direction.[21] Defendant contracted to construct a printing press brick foundation, and sent a foreman and men to do the work; plaintiff delivered goods at the building basement, interfering with defendant's work, and to hasten matters the foreman ordered the men to assist plaintiff, who was injured by their negligence; they were held not fellow-servants.[22]

9. **Anomalous co-servants.**—One who voluntarily assists a servant at the latter's request does not generally become a servant of the master so as to impose on the latter a master's duties and liabilities; the volunteer is hardly more than a trespasser; it may be otherwise where the servant is authorized to employ assistance, either expressly or by implication, as by necessity arising from an unforeseen emergency.[23] As "compulsory servants," such as pilots and convicts, are not free to contract, they cannot be said to have assumed the risks of a fellow-servant's negligence.[24] The master's liability extends to persons substituted by authority or necessity for regular servants.[25]

10. **"Superior rank" test of fellow-service.**—Many states hold the general rule not applicable to the case of a servant who, at the time of the injury, was under the general direction and control of another, who was entrusted with duties of a higher

[21] Hasty v. Sears, 157 Mass. 123.
[22] Brown v. Jarvis etc. Co., 166 Mass. 75.
[23] Johnson v. Ashland Water Co., 71 Wis. 553.
[24] Buckalew v. Tennessee etc. Co., 112 Ala. 146.
[25] Pugmire v. Oregon etc. R., 33 Utah 27.

grade, and from whose negligence the injury resulted. This is known as the "Ohio rule."[26] In some cases a foreman or superior giving an order to work in a particular place or with a particular machine, etc., is held to be a fellow-servant of the injured workman, for whose negligence the master is not liable.[27] Some cases hold that the power to hire and discharge other servants, when vested in the superior servant, is sufficient to remove him from the relation of co-servant with those under him, and hold the master liable for his negligent acts injuring other servants; but in most cases the power to hire and discharge is not regarded of more importance than the grade or rank of the fellow-servants, and is not considered a controlling test in fixing the liability of the master.[28]

11. **Same subject.**—But most authorities pay little attention to the rank or grade of the servants, and maintain that, as to the details in executing the work, the foreman and workman are fellow-servants, providing the master has employed someone to represent him in the management of the work, and has neglected no precaution in employing a competent foreman and in making reasonably safe provisions for the proper execution of the work. The weight of authority inclines away from the modification of the fellow-servant doctrine which excludes from its scope those who have authority over their fellow-workmen, and any relief from this must be derived

[26] Little Miami etc. R. v. Stevens, 20 Ohio 415.

[27] Moody v. Hamilton Mfg. Co., 159 Mass. 70.

[28] Compare Nix v. Texas etc. R., 82 Tex. 473, and Noyes v. Wood, 102 Cal. 389.

from statutes rather than courts' decisions.[29] By statute a peculiar rule obtains in Tennessee, and a coal mine owner is exempt from liability for the acts of a "certificated foreman."[30]

12. **"Different department" test of fellow-service.** —It has also sometimes been held that the general rule does not apply where one servant is injured by the negligent act of another, who, although employed in the same general business, had his service in some distinct branch or department of it; for example, a railroad track laborer injured by an engine driver's carelessness, or a carpenter employed on buildings hurt by a yardmaster's negligence in making up trains. This distinction obtains in Illinois, Kansas, Texas and other states. But many others hold that the general rule applies to such cases, including Massachusetts, Pennsylvania, Wisconsin. In Pagels v. Meyer[31] it is said: "The basis of the classification of servants of the same master into those who are fellow-servants and those who are not, as established in this state, is such personal relation and association between them as affords opportunity and power to influence each other to proper caution by counsel, advice and example, or the want of such personal relation and association. Where they are brought together in direct co-operation in the performance of a particular work, they have such opportunity and power and are brought within the relation required by the rule." The "Illinois department rule" is not

[29] Vogel v. American Bridge Co., 180 N. Y. 373.
[30] Sale Creek etc. Co. v. Priddy, 117 Tenn. 168.
[31] 193 Ill. 172.

so much a question of departments as of association in the master's work and of opportunity to influence one another to caution and to guard against one another's negligence. In Pagels v. Meyer, above, it is held, in order to constitute two employees of the same master fellow-servants, to be "essential that they should be, at the time of the injury, directly co-operating with each other in the particular business in hand, or that their duties shall bring them into habitual association so that they may exercise an influence on each other, promotive of proper caution."[32]

13. **Comments on these tests.**—In Huffcut on Agency[33] it is said the Ohio "superior officer" and the Illinois "different department" doctrines are "variations of the general rule and are rather the result of the shifting application of the rule than of any essentially different statement of it." In the leading case of Crispin v. Babbitt[34] a general superintendent in defendant's iron works negligently let on steam, starting a wheel whereon plaintiff was working, and this was held an operative act and not the performance of a non-assignable duty, and in so doing the superintendent was a fellow-servant. "The liability of the master," the court said, "does not depend upon the grade or rank of the employee whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or

[32] In World's Columbian Exposition Co. v. Lehigh, 196 Ill. 612, members of different gangs under the same foreman were held to be fellow-servants. In Tennessee the department doctrine is limited to railroads.

[33] § 272 (2d ed.).

[34] 81 N. Y. 516, LEADING ILLUSTRATIVE CASES.

represent the master in other respects, is, in the management of the machinery, a fellow-servant of the other operatives. On the same principle, however low the grade or rank of the employee, the master is liable for injuries caused by him to another servant if they result from the omission of some duty of the master which he has confided to such inferior employee." The superior officer must be distinguished from the vice-principal, whose standing will be discussed presently. The Ohio doctrine of superior officer has no reference to the nature of the work the superior is doing, but only to his rank or standing with reference to other servants.[35]

14. **Different employments under same master.**—The servant assumes only his own employment's hazards; hence, if an injury occurs by the negligence of another servant in another, wholly distinct, business, the master will be liable as in a stranger's case. Thus, miners employed in different tunnels of the same owner, eight hundred feet apart; the crews of two vessels having a common owner, and the like, are not fellow-servants. If two departments of the same service are so far separated as to exclude probable contact and resultant danger, the injured servant is not deemed to have assumed the risk of another servant's negligence.[36]

15. **The duties a master owes his servant.**—While the rule is well settled that the master is not liable to his servant for the negligence of the fellow-serv-

[35] Affirmed in New England etc. R. v. Conroy, 175 U. S. 323, overruling an earlier case, 112 U. S. 377.

[36] Norfolk etc. R. Co. v. Nuckol's Adm'r, 91 Va. 193.

ant, it is equally well settled that he is liable, however, for his own negligence; that is, for his own omission to perform with care and due diligence certain duties which he owes to his servant. Where, therefore, the servant is injured by reason of the master's omission to perform these duties, he may recover. It makes no difference whether the master himself has failed in the performance of such duties or whether the person whom he designated to act for him in that respect failed. In either instance the master is liable to the servant injured. In other words, the servant does not assume the risk of injuries caused by the negligence of the master in performing properly those duties which he owes his servant. It becomes important, therefore, to enumerate these duties the omission of which renders the master liable to the servant.

(1) *Suitable rules and regulations.* It is the master's duty to establish and promulgate general rules for the government of the service. For example, a railroad company must provide rules and regulations for the running of its trains. Whether a particular business requires rules and regulations depends upon its nature. Some businesses, being simple and having few employees and little machinery, need few regulations. Wherever adequate regulations will serve to reduce the dangers of the business, there the duty exists to provide suitable rules.

The scope of this duty is stated as follows: "The duty of the master in making rules is measured by the law of ordinary diligence. The law varies with the situation, for what would be ordinary diligence

under one set of facts would be negligence under another. If, however, under the circumstances of a particular case, the master has met the obligation of ordinary diligence in making and enforcing a rule, he is free from liability, even if some other rule would have been safer and better. The law requires him to make and promulgate reasonably safe and proper rules, and if he does so, he is not liable, even if he might have made safer and more effective rules."[37]

Whether the regulations are adequate for the situation is, according to some decisions, a question of fact for the jury; according to others, the question is for the court.

(2) *Safe place to work.* A master is bound to provide a reasonably safe place in which the servant performs his work. "It is the master's duty to exercise reasonable care in furnishing those things which go to make up the plant and appliances, so as to have them at the outset reasonably safe for the work of the servants who are engaged in the general employment; and, further, to exercise reasonable care, by means of inspection and repairs, when needed, to keep the plant and appliances reasonably safe."[38]

(3) *Safe tools and appliances.* The duty in respect to tools and appliances is substantially the same as the duty with respect to a safe place to work. In fact, some courts use the term "appliances" to include the place where the work is being done as well as the equipment.

(4) *Suitable fellow-servants.* The master owes

[37] Devoe v. N. Y. etc. Ry., 174 N. Y. 1.
[38] Smith v. Erie Ry. Co., 67 N. J. L. 636.

a duty to each of his servants to exercise due care in providing a sufficient number of suitable, efficient fellow-servants. The master's duty "to provide reasonably safe instrumentalities embraces the obligation to provide a sufficient number of servants to perform the work safely; proper and sufficient help and assistance are as essential in the performance of the servant's duty, where not safely performed alone, as safe instrumentalities, and the law enjoins upon the master the duty of providing them."[39]

The duty to provide suitable fellow-servants, sufficient in number to do the work safely, requires care proportionate to the danger that would result from the employment of incompetent or unskillful employees. And it cannot be avoided by assignment, nor excused by ignorance.[40]

The care to be exercised by the master in employing a servant is in proportion to the danger to others arising from incompetence and unskillfulness. "Where the service in which the servant is employed is such as to endanger the life and persons of co-employees, upon the plainest principles of justice and good faith, the master, upon engaging such servant, should be required to make reasonable investigation into his character, skill and habits of life" for the protection of such co-employees.[41] The master is required to exercise ordinary care in the discharge of this duty, such as reasonably prudent persons would use under like circumstances.[42]

[39] Peterson v. American etc. Co., 90 Minn. 343.
[40] Cooley, Torts (2d ed.), p. 660.
[41] Western Stone Co. v. Whalen, 151 Ill. 472.
[42] Washington etc. R. v. McDade, 135 U. S. 554.

"Incompetency exists, not alone in physical or mental attributes, but in the disposition with which a servant performs his duties; if he habitually neglects these duties, he becomes unreliable, and, although he may be physically and mentally able to do well all that is required of him, his disposition toward his work and toward the general safety of the employer's work and his fellow-servants makes him an incompetent man."[43]

If due diligence has been used in selecting a servant, subsequent facts disclosing unfitness must be brought actually or constructively to the master's notice before he will be deemed negligent in continuing the servant in the employment.[44] But a servant originally competent, having become incompetent for any reason, will make his master liable for his acts injurious to other servants, where the master knew, or ought to have known, of his subsequent unfitness. After the master has such knowledge he is bound to dismiss the incompetent servant.[45]

If an employee know or learn that his fellow-servant is incompetent and continue in the employment without objection, he is commonly held to take the risk of such incompetency.[46] It is otherwise if he does not know. While it is the master's duty to employ a sufficient number of efficient co-servants, his failure so to do may be so patent a risk that the

[43] Coppins v. New York etc. R., 122 N. Y. 557. Evidence of the servant's reputation for unfitness is competent, Chicago etc. R. v. Sullivan, 63 Ill. 293.

[44] Park v. New York etc. R., 155 N. Y. 215.

[45] Michigan etc. R. v. Gilbert, 46 Mich. 176; Lyttle v. C. & W. M. Railway Co., 84 Mich. 289.

[46] Davis v. Detroit & Milwaukee R. Co., 20 Mich. 105.

servant may be considered to assume it by continuing in the business, unless justified in believing he may so continue safely.[47] In some jurisdictions it is said "the law does not prescribe a rule so inflexible or unwise as that a servant must forthwith * * * or immediately quit the service of the master, upon the discovery * * * that he is working by the side of a negligent fellow-servant, upon the pain of conferring immunity upon the master for all liability for an injury incurred in consequence of such * * * incompetency. The true test in all such cases is, whether a person of ordinary prudence, acting with such prudence, would, under all circumstances, have refused to incur the risk."[48]

(5) *Warning of danger.* Under certain circumstances it is the duty of the master to warn his servants of dangers incident to the employment. "Where the master knows, or, had he used due care, would have discovered, that the employment is dangerous, and has reason to believe that his servant does not know the danger, and will not discover it in time to protect himself from injury, he is under a legal duty to give proper warning and instructions to the servant. The warning should be one and the instructions should be such as are suited to the circumstances of the particular case. If the servant is young and inexperienced, the instructions should be more minute than in the case of an adult, and especial care should be taken to make them intelligible."[49]

[47] Thorpe v. Missouri etc. R., 89 Mo. 650.
[48] Norfolk etc. Ry. v. Ampey, 93 Va. 108.
[49] Burdick, Torts, p. 168.

16. **Keeping things safe.**—After a master has supplied a safe place to work and suitable appliances, the place and the appliances may become unsafe by reason of the negligence of the servants using them. When this happens, the master is ordinarily not liable for the injury. For example, if the master supplies a safe engine, but the engineer in charge fails to put water in the boiler, whereby it explodes and injures a fellow-servant, the master is not liable; or, if the master supplies suitable ropes for a derrick and extra ropes to replace ropes as they wear out, and the servant fails to put in new ropes when needed, the master is not liable to a fellow-servant for an injury sustained by such omission. The distinction between supplying suitable appliances and keeping such appliances safe after they are supplied is well recognized, but it is not always easy to draw the line between the two.

In Jaques v. Great Falls Mfg. Co.[50] the court said: "In many kinds of service the care and keeping of tools and machinery in a condition of safety require merely the attention and repairs occasioned by ordinary use and wear, and are properly a part of the regular business of the servant engaged in the use of such tools and machinery. In such cases the employer's duty is performed by furnishing safe tools and machinery and the means of making needed repairs, and the duty of making repairs may be entrusted to servants, and any neglect in the performance of this service is the negligence of a servant. But in cases where skill and practical knowledge are

[50] 66 N. H. 482.

required in keeping machinery in a reasonable condition of safety, beyond what is needed in operating it, it is the employer's duty to supply the necessary intelligence, skill, and experience in the care and inspection of the machinery to protect the servant from injury; and for any failure to exercise proper care and skill the employer is accountable."

If a place at which a servant is set to work has been made dangerous prior to the servant's employment by the negligence of those whom his employment makes fellow-servants, such servant does not assume the risk of such negligence, if the danger is not obvious.[51] If one servant is injured by reason of an improper use by his fellow-servant of a proper machine or appliance, he cannot recover against the master. Where a servant patched up a ladder in a negligent way, whereby another servant was injured, the master was held not liable.[52]

17. **Vice-principal doctrine.**—The duties enumerated in § 15 are sometimes said to be non-assignable or inalienable. That is, the master cannot escape liability for the non-performance of them by delegating to someone else the duty of performance. These duties he must perform with due care and diligence. He may perform them by his own hand or by the hand of another. In fact, he may designate one of his ordinary servants to perform them for him. If he does so, such servant stands in the place of the master and is called the vice-principal. This is because he is performing the master's non-assignable

[51] Simone v. Kirk, 173 N. Y. 7. Contra, O'Connor v. Rich, 164 Mass. 560.
[52] Higgins v. Higgins, 188 Mass. 113.

duties. For his negligence in the performance of these duties, whereby another servant is injured, the master is liable.[53]

18. **Same subject—Operative and administrative acts.**—Whoever is thus set to perform the master's non-assignable duties above referred to, no matter what may be his rank or grade, represents the master and in that particular is not a fellow-servant of those to whom the duty is owed.[54] The master's responsibility is determined by the nature of the act in question; if the offending employee was in the performance of a duty devolving upon the master or was charged therewith, in reference to the particular act causing the injury, the master is liable; otherwise such employee is a fellow-servant.[55] The distinction between a fellow-servant and a vice-principal lies in the nature of the act to be performed; if it be an operative act, the employee is a fellow-servant of all other employees; if an administrative act, he is a vice-principal in that his act is his master's act; the same employee may be both a fellow-servant and a vice-principal, depending on whether he is performing the one or the other act.

19. **Same subject—Grade or rank of servants.**—"It cannot be disputed that the negligence of a servant of one grade is as much one of the risks of the business as the negligence of a servant of any other; and it seems impossible, therefore, to hold that the servant contracts to run the risks of negligent acts

[53] Hough v. Ry. Co., 100 U. S. 213.

[54] Mullin v. California etc. Co., 105 Cal. 77.

[55] Northern Pacific R. v. Peterson, 162 U. S. 346; Mast v. Kern, 34 Ore. 247, LEADING ILLUSTRATIVE CASES.

or omissions on the part of one class of servants and not those of another class. Nor on grounds of public policy could the distinction be admitted, whether we consider the consequences to the parties to the relation exclusively, or those which affect the public. * * * Sound policy seems to require that the law should make it for the interest of the servant that he should take care not only that he be not himself negligent, but also that any negligence of others in the same employment be properly guarded against by him, so far as he may find it reasonably practicable, and be reported to his employer, if needful. In this regard it can make little difference what is the grade of the servant who is found to be negligent, except as superior authority may render the negligence more dangerous, and consequently increase at least the moral responsibility of any other servant who, being aware of the negligence, should fail to report it. These views are supported by very numerous decisions, and the great weight of authority now is that the mere fact that one servant has authority over another does not create an exception to the general rule that exempts the master from liability for an injury to one servant by the negligence of a fellow-servant."[56]

20. **Same subject—Act and not the grade.**—As stated by Judge Thompson in his work on Negligence, it is not the grade or rank of the servant inflicting the injury, as compared with the one injured, that is the true test to determine whether the

[56] Cooley, Torts (student's ed.), pp. 544-545; Crispin v. Babbitt, 81 N. Y. 516, LEADING ILLUSTRATIVE CASES.

master is responsible, but it is the character of the negligent act or omission which the wrongdoing servant was doing at the time that controls. "If it was an act of service, then, in jurisdictions where the fellow-servant doctrine prevails, the master is not liable, although the servant inflicting the injury may be, for general purposes, a representative of the master and his alter ego or vice-principal; but if it was an act of vice-principalship, an act done in the discharge of some duty which the law devolves primarily upon the master, and which is unalienable, then the master will be liable, although the servant inflicting the injury may be of the lowest grade in his service. Out of these considerations springs what is called the 'doctrine of dual relationship' of a servant. The meaning is that the same servant may be, with respect to acts of a certain kind, a fellow-servant of the others, and with respect to acts of another kind, a vice-principal of the master. Thus the negligence of one occupying generally the position of vice-principal to servants employed under him, in failing to provide safe and proper appliances, is chargeable to the master, although, in handling such appliances, he may be a fellow-servant."[57]

21. **Same subject—Superior officer.**—Where two persons, subject to the same general master's control and direction, are working to accomplish the same common object, though one is higher in rank, and he has the right to direct and control the other's work, "in such cases, the subordinates assume the risks of the negligence of their superiors in their

[57] Thompson, Negligence, §§ 4918, 4923.

work of supervision, to the same extent as that of those who work by their sides. * * * The distinction upon which these cases rest is that between an act of vice-principalship and a mere act of service. The meaning is, that where a superior servant is performing a positive and unassignable duty of the master, his negligence is the master's negligence, no matter what his grade or rank in the service may be; but where he is performing a mere detail of work, his negligence is that of the fellow-servant, although he may be in command over the injured servant, and although his negligence may consist in giving an erroneous command or direction."[58] The "non-assignable duty" test is founded on the notion that a master owes his servants certain duties for the proper performance of which he continues liable, whether he performs them personally or through representatives; and the servant does not assume the risk of their due performance, even though aware that they are to be performed by a co-servant.

22. **Same subject—A summary.**—Huffcut on Agency,[59] in substance, thus summarizes the vice-principal doctrines: "A master remains liable to his servant for a vice-principal's negligence. There are two tests of vice-principalship, but they are not entirely antagonistic, and one may be combined with a part of the other. This leads to these possible results: (1) The negligent servant's rank is the sole test; if the negligent employee is the injured employee's superior officer the master is liable, irre-

[58] Thompson, Negligence, § 4938.
[59] § 277 (2d ed.).

spective of the character of the act; if not such superior officer, the master is not liable, whatever its character. (2) The character of the act is the sole test; if the superior officer performs an operative act he is a fellow-servant; if an inferior servant performs a non-assignable duty, he is a vice-principal. (3) The negligent servant's rank is a sufficient test in case the negligent servant is the injured servant's superior; in other cases the character of the act is the proper test. The second is the commonly accepted view. In a few states, the combination indicated in the third is accepted." This doctrine is now comprehensively termed the "dual capacity" test, and is a mixed question of law and fact.[60]

23. **Injured servant's contributory negligence.**— The master's liability for negligently failing to perform a personal or non-assignable duty is also subject to the rule that the servant cannot recover for injuries proximately due to his own contributory negligence. This is merely an application of the general rule that contributory negligence bars a recovery at common law. But care should be taken to distinguish between contributory negligence and assumed risk, for both may arise in the same case; thus, plaintiff claims that the platform on which he worked was unsafe and unlighted; if unsafe he may have assumed the risk; if unlighted, suitable torches may have been furnished which plaintiff negligently failed to use.[61] It is not necessarily contributory negligence for a servant to expose himself to danger

[60] Fogarty v. St. Louis etc. Co., 180 Mo. 490.
[61] Kaare v. Troy Steel & Iron Co., 139 N. Y. 369.

to rescue a fellow-servant imperiled by the master's negligence.[62]

24. **Effect of master's promise to remedy.**—The general rule is that if a servant notifies the master, or the master is otherwise apprised of a defect or danger, and the master gives the servant to understand that the matter will be remedied, the servant may wait a reasonable time for this to be done and not thereby lose his rights. Hence, if a master promises to discharge an incompetent co-servant or employ a sufficient number of co-servants, the endangered employee may continue in his employment a reasonable time thereafter at the master's risk.[63] Such promise by the master generally operates to neutralize an assumption of risk, and if in the particular case the master's business is entrusted to another, the assurance of such other person is that of the master; but the rule is otherwise, as we shall see, as to the assurance by any mere subordinate servant.[64]

25. **Contract relieving master.**—Whether the servant may specially contract to waive the benefit of this rule, is disputed. For a breach of any of the personal, non-assignable or statutory duties the master is liable in damages to the injured servant, and it is generally held that he may not contract beforehand with the servant for release from liability for his own or a co-servant's neglect. Even an express agreement when made is considered void as against

[62] Saylor v. Parsons, 122 Iowa 679.
[63] Maitland v. Gilbert etc. Co., 97 Wis. 476.
[64] Ft. Wayne etc. R. v. Gildersleeve, 33 Mich. 133.

public policy.[65] In some states the statutes themselves expressly forbid such contracts. These, of course, control.

26. **Burden of proof.**—When a suit has been brought against the master by a servant to recover for negligence on the master's part as to any of the duties discussed, the burden of proof is upon the servant to show that the injury resulted from such negligence, and that the negligence was the proximate cause of the injury.[66] The servant must himself be free from contributory negligence.[67] When the injured and offending employees are in the same common service, they are presumably fellow-servants within the general rule of assumed risk, and the burden is on the plaintiff to show differently.[68] It rests on the plaintiff to show the master's negligence in employing or retaining the servant whose wrongdoing caused the injury. That the master had notice or knowledge or by exercising ordinary care might have known of the incompetency is sufficient. Notice to one empowered to hire, discharge or suspend employees, is notice to the employer, otherwise to a mere superintendent; and mere proof of specific careless acts is insufficient to charge the master with such knowledge; and mere laziness or a single negligent act is not generally enough to show a servant incompetent.[69]

[65] Lake Shore & M. S. Railway Co. v. Spangler, 44 Ohio St. 571; Chicago etc. R. v. Maroney, 170 Ill. 520.

[66] Montgomery Coal Co. v. Barringer, 218 Ill. 327.

[67] See § 23.

[68] Chicago etc. R. v. Leach, 208 Ill. 198.

[69] National etc. Co. v. Travis, 102 Tenn. 16.

27. **Wrongdoing servant's liability.**—If one servant by negligence in his employment injures a fellow-servant he is liable to the latter for damages caused thereby.[70] A wrongdoing servant is liable, moreover, to the master for damages the latter has to pay for the former's negligence, except where each is a tort-feasor.[71] Some cases limit liability to misfeasance. But most states include negligent nonfeasance.[72]

28. **Statutory changes.**—The duties outlined in the foregoing sections have been made the subject of statutory enactment. In Union Pac. R. Co. v. Erickson,[73] it is said: "When the law of fellow-servants was first announced, business enterprises were comparatively small and simple. The servants of one master were not numerous. They were all engaged in the pursuit of a simple and common undertaking. Now things have changed. Large enterprises are conducted by persons or by corporations employing vast numbers of servants divided into classes, each pursuing a different portion of the work, and each practically independent of the other. The old reasons do not apply to the new conditions." The master's liability to one servant for another servant's negligence has been much enlarged by statutes; these are sometimes general in their nature and sometimes applicable only to railroads. By statute in several jurisdictions the "superior officer" test is made a part of the positive law. The so-called

[70] Osborne v. Morgan, 130 Mass. 102.
[71] Georgia etc. R. v. Jossey, 105 Ga. 271.
[72] Murray v. Usher, 117 N. Y. 542.
[73] 41 Neb. 1.

"employers' liability acts" make the master liable for the negligence of any employee having and exercising superintendence, or to whose orders or directions the workman at the time of the injury was bound to and did conform, and of any employee having charge and control of any signal, switch, locomotive engine, train, etc., on any railroad. In some states the acts apply only to railroads; in others, the entire rule is abolished or materially modified.

29. **Same subject.**—The first railroad employers' liability law was enacted in Georgia in 1855, and has been re-enacted, modified and extended in many other states. The first general act was the English Employers' Liability Act passed in 1880, providing in substance that when personal injury is caused to a workman by reason of (1) any defect in the condition of the ways, works, machinery or plant connected with or used in the employer's business, which defect arose from, or had not been discovered or remedied owing to, the employer's negligence or that of some one in his service entrusted by him with seeing that the ways, etc., were in proper condition, or (2) the negligence of any one in the employer's service who has any superintendence entrusted to him, while exercising such superintendence, or (3) the negligence of any one in the employer's service to whose order or directions the workman at the time of the injury was bound to and did conform, such injury resulting from such conformance, or (4) the act or omission of any one in the employer's service done or made in obedience to the employer's rules or by-laws or to particular instructions given by

any one delegated with the employer's authority in that behalf, the injury resulting from some impropriety or defect in the rules, by-laws, or instructions, or (5) the negligence of any one in the employer's service who has charge and control of any signal points, locomotive, engine or train upon a railway; in each case, the injured workman shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work, unless the workman knew of the defect or negligence which caused the injury, and failed within a reasonable time to give or cause to be given, information thereof to the employer, or some person superior to himself in the employer's service, unless he was aware that the employer or such superior already knew of such defect or neglect. Limitations are fixed as to the time within which action may be brought and as to the amount recoverable. This act has been re-enacted in many states.[74]

30. **Master's own negligence.**—It must be remembered in applying the fellow-servant rule, that where negligence of the master, or of one for whose conduct he is answerable, concurs with that of one related as fellow-servant to the party injured, and the negligence of the master or his representative is a proximate or efficient cause of the injury, the master will be liable, notwithstanding the fellow-servant's concurring negligence. The fellow-servant doctrine only

[74] For a full discussion the reader is referred to Reno, Employers' Liability Acts. The cases almost uniformly hold that such acts are constitutional.

applies to cases where the fellow-servant's negligence has been the sole cause of the injury complained of, the reason being that while the master cannot prevent negligence on the fellow-servant's part, he can guard against his own negligence, and where he fails to do so, as by failing to furnish sufficient co-laborers, and the like, and as a result of his negligence, combined with negligence on the fellow-servant's part, one is injured, the master is liable.

CHAPTER II.

WORKMEN'S COMPENSATION ACTS.

31. **Modern changes.**—An employers' liability law means a statute making the employer alone liable for the compensation, in whatever form it may accrue, in a lump sum or in periodical payments like unto a pension. By a workingmen's compensation law is meant a statute under which the state in some way accumulates a fund from the employers (separately or in connection with the employees), out of which is paid the compensation due the injured workman or his dependents. Under the new and proposed legislation, the common law rules of assumed risk, contributory negligence, and fellow-servants being abolished, the workman, when injured in the course of his service (but not when intentionally injuring himself), is provided with a means of determining the amount of compensation to be awarded without a lawsuit, and such compensation is made to stand as a support for the injured employee and his dependents, non-assignable and not subject to be taken from the beneficiary by any judicial procedure.

32. **Where adopted.**—Germany has had an industrial insurance department, regulated and supervised by the government, for many years. The English Workmen's Compensation Act was passed in 1906,

covering personal injury by accident. Serious and willful misconduct of the employee precludes his recovery, but the burden of showing such is on the master. Tips to a waiter are held to be within the "earnings in the employment" embraced in the act. Workmen's insurance and compensation laws have been passed in the chronological order given in Montana, New York, Washington, Ohio, Wisconsin, Massachusetts, New Jersey, Illinois, Kansas, California, Michigan, Nevada, New Hampshire, Rhode Island, Maryland, Arizona and by the Federal Congress.

33. **General characteristics.**—Under the employers' liability laws and the workmen's compensation acts, the employer is personally liable. Under the latter the only "negligence" recognized is that due to willfulness; if of the employer, he is penalized; if of the employee, he is either penalized or is denied compensation or the compensation is reduced. Jury trials under the latter acts are either largely or wholly eliminated and the injured workman's compensation is determined by a board of arbitration or otherwise, as fixed by the acts. Workmen's industrial insurance acts are fundamentally different, in that the injured workman's claim is against a fund created by contribution paid by employers, employees or the state, or by any of them, in insurance premiums collected by the state's taxing power under its police power. A majority of the statutes provide an employer's liability, although Ohio, Washington and Massachusetts and others provide a scheme of insurance under state supervision, the premiums to be paid by the employers. The Washington statute, though com-

pulsory on both employer and employee, was upheld in State v. Clausen.[75]

34. **Constitutional questions involved.**—"The insurance and compensation acts are generally contested on the ground that they are violative of recognized constitutional limitations, in that they authorize the taking of property without due process of law, they lack uniformity of operation, they curtail unlawfully the administration of judicial authority, they authorize the taking of private property for public use, they delegate legislative powers, they impair the obligations of contracts between employer and employee, they amount to an unreasonable exercise of the police power."[76] But there are decisions which either expressly or by analogy refute all these objections as applied to most of the acts.

35. **New York and Montana laws invalid.**—The New York statute of 1910 was made compulsory upon both the employer and employee and was held unconstitutional in Ives v. South Buffalo Ry. Co.[77] because it undertook to deny to the parties the right of trial by jury, and because an employee could not be compelled by the legislature to accept less than his common law damages, nor could the employer be forced to pay damages when he was nowise at fault. The Montana Act, passed in 1909, was declared unconstitutional on the ground that, in permitting employees to waive their rights under the insurance act and to sue an employer who had made the required contributions to the insurance fund, there was not

[75] 117 Pac. 1101 (Wash.).

[76] Boyd, Workmen's Compensation and Insurance, § 76.

[77] 201 N. Y. 271, 94 N. E. 431, LEADING ILLUSTRATIVE CASES.

given to the employer that equal protection of the law which is his constitutional right. The court intimated that this defect might be cured by supplemental legislation.[78]

36. **Massachusetts and other laws upheld.**—The Massachusetts Act, passed in 1911, is entirely optional, both as to employer and employee. The former is entirely free to take no insurance, or to insure himself in the State Company or in some private accident company. If the employee declines to come under the act, the common law defenses are available against him. But if he accepts he is immune therefrom, the purpose being to induce the employees to accept the statute. If the employer declines to take insurance, then in a suit by the employee he is precluded from using these defenses. The employee cannot recover where injured by his own serious and willful misconduct. The compensation is doubled where the injury is due to such misconduct of the employer or of one regularly exercising a superintendent's powers. The employee may elect to sue at law upon formal notice when hired or, if the employer later becomes a subscriber, within 30 days thereof. Since the act provides this common option, the justices were of the opinion that it does not violate any provision concerning the right of trial by jury, or deny due process of law.[79] The Ohio Act is virtually compulsory on the employee if the employer elects to avail himself of it and gives the re-

[78] Ives v. South Buffalo Ry. Co., 201 N. Y. 271, LEADING ILLUSTRATIVE CASES; Cunningham v. Northwestern Imp. Co., 44 Mont. 180.

[79] In re Opinion of Justices, 209 Mass. 607.

quired notice, and the employee continues to serve. If the employee refuses to accept compensation as the act provides, the employer may avail himself of the common law defenses. This the Supreme Court held valid in State v. Creamer.[80] The Washington Supreme Court upheld the Washington Industrial Insurance Act of 1911 in State v. Clausen.[81] The court referred to the Ives case in New York without criticizing it, but stated they were unable to yield their consent to the view there taken. The court expressly refrained from passing upon the constitutionality of the act so far as depriving the parties from right of jury trial was concerned, as that factor was not before the court.

The Wisconsin Act is substantially the same as that of Ohio except that after the employer's acceptance the employee has 30 days in which to file a refusal, in which case the employer is remitted to his common law defenses. The Wisconsin Workmen's Compensation Act of 1911 was upheld in Borgnis v. Falk.[82] The court summarizes the act as follows:

"It creates an administrative board to carry its provisions into effect. It divides all private employers of labor into two classes: (1) those who elect to come under the law, and (2) those who do not so elect. It takes away the defenses of assumption of risk and negligence of a co-employee from the second class (except that where there are less than four co-employees the latter defense is not disturbed), but

[80] 97 N. E. 602 (Ohio).
[81] 65 Wash. 156, 117 Pac. 1101.
[82] 133 N. W. 209 (Wis.).

leaves both defenses intact to the first class. It prescribes the manner in which an employer may elect to come under its terms, and how an employee may make his election, and when silence on the part of the employee will be considered an election; but it does not in terms compel either employer or employee to submit to its provisions. It then provides a comprehensive scheme by which, after both parties have so elected, any substantial injury, whether the result be fatal or not, received by the employee in the course of or incidental to his employment (except those caused by willful misconduct) shall be compensated for by the employer according to certain definite rules, which rules are to be administered by the administrative board aforesaid by means of simple procedure definitely laid down, which gives to both parties fair notice and hearing, and results in findings and an award which may be filed in the circuit court and become a judgment. It further provides that the findings of fact shall be conclusive and the award subject to review only by action in the circuit court of Dane county, in which it can be set aside only (1) if the commission acted without or in excess of its powers; (2) if the award was procured by fraud; or (3) if the award is not supported by the findings of fact. It then provides that the judgment thus rendered shall be subject to appeal to the supreme court." The statute was held not to be violative of any article of the constitution of the state or the Federal Constitution.

37. **Sundry acts in other states.**—The New Jersey Act automatically places each employment contract

under its compensation section, but permits either party to elect not to be subject to its provisions and to have recourse to actions at law for compensation. The law has been sustained by the lower courts. The California Act is a slightly modified adaptation of the Wisconsin Act and embodies the doctrine of comparative negligence, as does also the Nevada Law. The Kansas Act is purely optional, with the same general provisions as in other states, both as to acceptance and rejection. The New Hampshire Act is an alternative between the employer's personal liability and his contributing to a state insurance fund. In Illinois acceptance is optional with the employer, but if he declines he is deprived of the common law defenses, as in Massachusetts, except that contributory negligence may be considered by the jury in reducing its award. In Michigan compensation is allowed regardless of negligence, except where willful, and the employer is denied the common law defenses. The act is compulsory as to public service, but optional as to private employers. The Rhode Island and Maryland Acts are similar to Illinois, except they omit contributory negligence. The Arizona Act closely resembles the Washington compulsory law. The Federal Employers' Liability Act of April 22, 1908, making railroads engaged in interstate commerce liable to their employees, does not authorize suits in state courts.

38. **Comments on laws already adjudicated.**— The opinions of the courts of Ohio and Wisconsin, in which states the statutes are optional and not compulsory, seem to disapprove of the New York de-

cision in the Ives case; while the Washington Supreme Court, in order to maintain their compulsory act, discussed the police power at length and upheld the act by holding that a state might compel an employee to take less than his common law damages and compel an employer to pay compensation where he was not in any wise at fault. "The legal basis for the Ohio, Washington and Massachusetts laws is found in the taxing power of the state exercised through its police power for the protection of the health, safety and the general welfare of the public. The Compensation Acts of the nine other states mentioned are adaptations of the British Workmen's Compensation Acts and in no way depend upon the taxing power of the states. The bases of the two kinds of acts are fundamentally different under our constitutional limitations."[88]

39. **General provisions of the several acts.**—The several acts cover various classes of employers and employees, govern the giving of notices of injury, enumerate the injuries covered, fix the compensation in the event of death, specify the persons who are beneficiaries as dependents, regulate the time when compensation begins in case of disability (partial and total), specify what medical and surgical aid is included, regulate the manner in which the compensation is to be paid, provide for the necessary examination of the injured workman, and regulate the taking of appeals from awards made.

40. **Meaning of terms.**—Many controversies have arisen under the British, Canadian and Australian

[88] Boyd, Workmen's Compensation and Insurance, § 167.

statutes as to who are "workmen," and doubtless the same thing will occur as to the American acts, and each must be determined as it arises. The word "accident" in the British act is taken in its popular and ordinary sense, and denotes and includes any unexpected personal injury resulting to a workman in the course of his employment from any unlooked-for mishap or occurrence. What constitutes "serious or willful neglect" of either the employer or employee is considered a mixed question of law and fact. The limitation of compensation to accidents "arising out of and in the course of the employment" presents a question which is quite analogous to the common law cases and which will doubtless be governed largely by adjudications thereunder. The determination of the question as to who are "dependents" of a deceased workman seems to rest on substantially the same principles as those involved in ascertaining who are the beneficiaries under "Lord Campbell's Act." There is no uniformity in the fixing of the amount of compensation in cases resulting in death or in either total or partial disability, and on this subject the statute of the particular state must be consulted.

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QUIZ QUESTIONS
LAW OF TORTS
PART I
TRESPASS

(*The numbers refer to the numbered sections in the text.*)

1. What is the meaning of trespass? In actions of trespass, does the intention of the trespasser affect his liability?
2. What are the several forms of trespass to the person, and what is the meaning of each?
3. (a) A knocked the hat off B's head. Was this a battery? (b) A was in B's store. B touched her on the shoulder and asked her to go into another room, which she did. There he accused her of having stolen a small article from the counter. The charge was false. Was this a battery? (c) A, for the purpose of enabling C to pick B's pocket, touches B and draws his attention away. Is this a battery?
4. After being removed by the brakeman from a coach to a smoking car, an intoxicated passenger addressed insulting words to the brakeman and said to him, "I'll see you later." Thereupon the brakeman struck the passenger, breaking his jaw. Did the passenger's language relieve the brakeman of liability for a battery?
5. (a) A and B are pitching a baseball from one to the other in a public street. The ball, thrown by A, hits a passer-by and severely injures him. Is A liable for a battery? (b) A drives a wagon carelessly along the road, and takes it on the side path. B being on the side path and seeing the wagon coming close behind her, urged by sudden terror, springs aside and is injured by striking against the wall of a building. Is A liable for a battery? (c) A whips the

horse on which B is riding so that the horse runs away and runs over C. Can C recover of either A or B?

6. (a) A throws a stone at B, but hits C. May B recover for an assault? (b) A throws stones down a crowded street at his dog, and puts the plaintiff, a woman, in great terror. Is A liable for an assault?
7. (a) The plaintiff went to attend a dinner of a certain society. A policeman, by the defendant's order, stood in the doorway. The policeman obstructed the entrance so that the plaintiff was unable to pass by him. Is the defendant liable for an assault? (b) A presents an unloaded pistol at B, saying, "I don't intend to shoot you." Is this an assault? (c) A, at fifty yards distance, threatens to knock down B with a stick which he has in his hand. Is this an assault?
8. Is the maxim, De minimis non curat lex (The law pays no attention to trifling claims), applicable to trespass to the person? Give a well-considered answer.
9. (a) A, a constable, without legal authority, approaches B and says, "I have a writ against you, you are my prisoner." B turns and goes along with A. Has B an action for false imprisonment? (b) The plaintiff was assessed for taxes, which she thought illegal. The collector, being in a room with her, demanded payment, which she declined making until arrested. He then told her that he arrested her, but did not lay his hand upon her. She then paid the tax. May she recover for false imprisonment?
10. A constable, without actual legal authority, but with a show of authority, accompanies B and follows him wherever he goes. He does not, however, interfere with B's freedom of movement. Has B an action for false imprisonment?
11. (a) A is injured in a railway collision caused by the negligence of the railway company. May the damages, which it is admitted he may recover for his physical injuries, be enhanced by damages for his mental anguish? (b) A parent is allowed to recover for loss of services caused by injury to a child through a battery. May the parent recover also damages for the mental anguish occasioned by seeing the child undergo great physical suffering?
12. What are the different views taken by the courts of different

jurisdictions on the subject of allowing damages for physical injury induced by fright? What are the principles on which they base their several lines of decision?

13. The defendant committed a forcible trespass on the premises of the plaintiff and her husband, and applied vituperative and insulting language to them, and pointed a pistol at the plaintiff. As a consequence, the plaintiff was greatly agitated and frightened, and afterwards became seriously ill. May she recover for the illness induced by the fright?
14. The plaintiff was in her yard hanging out clothes. The defendant was blasting in a neighboring quarry. After two or three explosions producing the average noise, there came a terrific one which frightened the plaintiff so that she fainted and afterwards was seriously ill. A few small pieces of rock struck and slightly cut her hands. Has she an action for the illness induced by the fright?
15. The plaintiff was assisting her husband in a public house, standing behind the bar. The defendant negligently drove a van into the room. The plaintiff, who was pregnant, sustained a severe fright and shock, and suffered in consequence a miscarriage. Give the argument for and against allowing a recovery of damages.
16. The United States brought an action for a trespass on government lands. The defendant was a homestead claimant and, after the bringing of the action, secured a receiver's receipt for the land. The complaint shows that the defendant cut and chipped trees to obtain turpentine which he sold. Is defendant liable for trespass?
17. The plaintiff owned a narrow duck-pass between two navigable lakes. The defendant shot, from a blind in one of the lakes, ducks flying across the pass, so that some shot passed over, and some fell on, the plaintiff's property. Is the defendant liable in an action of trespass?
18. A sheriff went into a shop kept by B and said he had instructions to attach a certain carpet in an adjoining room, for a debt owing by B. B told the sheriff that the carpet belonged to C. The sheriff nevertheless made a return that he had attached "one carpet, the property of B, valued at $10." May C maintain an action of trespass against the sheriff?

19. A, a near relative, went into the room of a dying man, B's testator, and removed some jewelry from an unlocked drawer, for fear it might be stolen, and put it in another room in an unlocked cupboard. Later, some of the jewelry had disappeared. Is A liable to B for nominal damages for a trespass?

20-22. (a) The plaintiff and the defendant went out hunting together. As the defendant was walking behind the plaintiff, the former's gun went off accidentally and shot the plaintiff. Is the defendant liable? (b) The defendant and others were shooting pheasants. The plaintiff was employed by one of the party to carry cartridges. The defendant shot at a bird; but the shot struck a tree, and glancing off hit the plaintiff. Is the defendant excused on the ground of accident?

23. (a) The defendant was out hunting wolves, and shot by mistake the plaintiff's dog, which looked liked a wolf. Is he excused? (b) A surgeon amputated the plaintiff's leg. But, instead of amputating the left leg, as agreed, he cut off by mistake the right leg. Is he liable therefor?

24. What is the meaning of the maxim, Volenti non fit injuria?

25-26. (a) The family doctor came to attend the plaintiff in childbirth. He brought with him another man, unmarried, and not a physician. The plaintiff, believing him to be an assisting physician, made no objection to his presence. Afterwards, on learning the truth, she brought an action. Is the intrusion excused on the ground of consent? (b) The plaintiff voluntarily had intercourse with the defendant and was infected with a venereal disease, which the defendant then had unknown to the plaintiff. Is the defendant liable?

27. (a) The plaintiff and defendant were members of a charivari party serenading a bridal couple with various instruments of noise, including firearms. The plaintiff was injured by wadding from the defendant's gun. May he recover damages? (b) A and B were playing baseball. B in throwing the ball to second base struck A, who was then running to make that base, and fractured his skull. May A recover damages of B?

28-29. (a) The defendant was riding on horseback, when the

plaintiff ran up and seized the bridle. The defendant told him to "loose hold," and he not doing so, the defendant struck him on the head and face with the riding whip with sufficient force to bring blood. Was defendant's act excusable? (b) The plaintiff entered the defendant's premises for the purpose of notifying him of the straying of his stock, and the defendant ordered him to depart. Upon his failure to do so instantly, the defendant assaulted him, striking him with a gun and breaking his arm. The court instructed the jury that the defendant had a right to use such force as was necessary to remove the plaintiff from the premises. Is this instruction correct under the circumstances?

30. A and B had gotten into a quarrel; from words they had come to blows; they grappled, and A had thrown B to the ground and was beating him with his fists. B's two sons coming up seized A and, A still resisting, one of the sons struck him a violent blow, breaking his nose. Is the son liable to A for a battery?

31. (a) The defendant on raising the anchor of his vessel found it to be entangled in the plaintiff's submarine cable. To save the anchor, he cut the cable. Was this trespass excusable? (b) The plaintiff's dog had repeatedly killed the defendant's hens and rabbits. Seeing the dog passing along the road one day, the defendant shot him. Was the act justified?

32. The defendant's father was the owner of a piece of land on which there was an aqueduct. The father had forbidden the plaintiff to enter his land where the aqueduct was, and had directed the defendant to watch the aqueduct and see that no one interfered with it. The defendant went near the boundary of the land where the aqueduct was and found the plaintiff about to enter the land on his way to the aqueduct. The defendant forbade his entering; but the plaintiff sprang over the fence and proceeded toward the aqueduct. The defendant thereupon struck him several blows, which he claimed were in defense of the land and the aqueduct. Was the battery justifiable?

33-35. (a) A took B's horse. B the same day requested A to return it, but A refused. B said if A would not return the

horse he would take it in spite of him, and took up a stick and made towards A. Was the assault justifiable? (b) A trespasser was carrying off B's parrot. B in recapturing the parrot wounded A. Was the act justifiable? (c) A, on B's land, was wrongfully loading his wagon with logs. B took the logs off the wagon. Was he justified? (d) A statute provided that a person may impound a beast found in his inclosure doing damage. While so proceeding to impound a cow belonging to the defendant, the plaintiff was struck and injured by the defendant in his efforts to retake the cow. Was the act justified?

36. What is the statute of 5 Richard II? What was its purpose? Is it law in the United States?
37. What is the difference in the two lines of decisions applying the statute of 5 Richard II?
38. A was insane and a proper subject for confinement in a state institution. He was addressing a crowd in the street. B, from motives of kindness and humanity, fearing he might become violent, partly persuaded and partly forced A to go with him, and then kept him confined in his house, treating him kindly, until he could get him committed to an institution by the proper authorities. A sues him for false imprisonment. Were his acts justified?
39. A coal barge belonging to the plaintiff slipped its moorings and floated down the stream, without any person in charge, catching and holding back a large quantity of ice, and endangering the property of the defendants and of other persons. The defendants destroyed the barge, not being able to dislodge and save it. Were they justified?
40. For noisy and disorderly conduct the captain of a ship locked up the plaintiff, one of the passengers. Was he justified?
41. (a) The plaintiff kept a shop for the illegal sale of intoxicating liquors, such a shop being declared by statute to be a common nuisance. The defendant broke into and entered the shop and destroyed the liquor, in order to abate the nuisance. Was he justified? (b) The plaintiff owned a dog which was very vicious and frequently attacked persons passing in the street. It had recently been bitten by a mad dog. Defendant seeing the dog running loose shot it. Was

he justified? (c) On the plaintiff's land there was a large collection of filth, refuse and manure, which was offensive to the defendant on the adjoining premises. The defendant entered the plaintiff's premises without notice, dug up the soil and abated the nuisance. It did not appear whether the nuisance had been created by the plaintiff or not. Was the defendant justified?

42. (a) A was a peace officer, and B was a constable under A. They had some altercation, and as A left, B followed and struck him. A went for assistance. Returning two hours later with two constables, A told B that he must go with him. B said he would not stir an inch that night. A tried to take hold of him, whereupon B struck him on the head with a clock weight. Was B acting in resistance to a lawful arrest? (b) Two police officers, without a warrant, arrested the plaintiff on suspicion that he was engaged in the commission of a felony. The plaintiff had taken in a satchel some jewelry and silverware, rightfully in his possession, to a pawn shop to borrow money. Not getting a satisfactory loan, he started to return home, when he was stopped on the street by the officers and against his protests was handcuffed and taken to the police headquarters, where he was refused bail and locked up over night. It happened that a pistol was found on the plaintiff's person, in violation of a municipal ordinance. Have the officers a good defense in an action for false imprisonment?

43. (a) The plaintiff was employed by the defendant as a clerk in his employment bureau, and as such had charge of a book containing names of persons wanting help. The plaintiff took the book home with her Saturday night for the purpose, as she said, of sewing the covers on and completing the index. The defendant suspected that she had taken the book for the purpose of making copies to furnish to his competitors in business. On Sunday afternoon she returned with the book, when the defendant called in an officer and had her arrested. She was kept in confinement over night, and at the hearing next morning was discharged. Was the defendant justified? (b) The plaintiff was a passenger on an excursion steamer. There was some fighting on board, in the course of which the plaintiff was assaulted. The mate

locked up the plaintiff's assailant and some other persons in the hold. When the steamer returned to port, the mate pointed the plaintiff out and directed a police officer to arrest him. Upon arraignment the plaintiff at first pleaded not guilty, but afterwards changed his plea to guilty, and was fined $5. Not having the money to pay his fine, he was put in a van with criminals and driven to jail, where he was kept until the next morning, and then released. He sued the steamboat company for false imprisonment and recovered $800 damages. Would you sustain the judgment?

44-46. (a) The defendant was arrested by an officer who had an insufficient warrant and read it to the defendant. The defendant resisted arrest. The officer had personal knowledge of the offense and could have lawfully arrested the defendant without the warrant. Is the defendant liable for his act of resistance? (b) A deputy sheriff arrested the plaintiff on execution. The execution was regular in form, under a magistrate's certificate; but it turned out that the execution was in fact invalid, because the magistrate had been attorney for the creditor in whose favor the execution was issued. Is the officer liable? (c) On a replevin writ against A's goods, may the officer justify an entry of B's house to find them, A's goods not actually being there?

47. (a) A, having legal authority to enter B's lands to make seizure of goods, breaks open the outer door of B's dwelling house; (b) A, having legal authority to seize B's horse, seizes B's horse and buggy; (c) A, having legal authority to enter B's land to serve a writ, remains to fish in a fish pond; (d) A, having lawfully entered B's hotel, refuses to pay for his lodging. In these cases is A a trespasser ab initio?

QUIZ QUESTIONS*

LAW OF TORTS

PART II

CONVERSION

(*The numbers refer to the numbered sections in the text.*)

1. Name the actions which lay at common law for the wrongful taking or detention of personalty.
2. A gives B his watch to hold for him while he fights C. Later B refuses to return the watch. Will replevin lie? Give reasons.
3. Define the action of detinue.
4. In what way does trover differ from replevin?

5-6. What is meant by conversion? By "converted to his own use"?

7. Distinguish trespass and trover.
8. What is the nature of an act necessary to constitute a conversion?
9. Define wrongful taking.
10. Does trover lie for the conversion of a baggage check?

11-12. What right must the plaintiff have in the property in order to bring an action for conversion?

13. What is the rule with reference to the necessity of proving an intent to convert?
14. What is the meaning of intent to convert?

15-16. Must there be a demand for the goods by the plaintiff and a refusal to surrender them by the defendant to bring an action for conversion? Of what effect on the action is a qualified refusal?

* Prepared by the Editors.

17. A sues B in trover for a watch and obtains a judgment of $125. In whom is the title to the watch?
18-19. Give an example of a conversion by a bailee; by a pledgee.
20-22. What is an innocent purchaser? What title does an innocent purchaser acquire from one having a defeasible title? What is the rule as to conditional vendees?
23. Is an attaching creditor an innocent purchaser?
24-25. What rules apply as to protection from liability in conversion where the deals are according to the ordinary course of business? What rule applies in such cases to negotiable instruments?

QUIZ QUESTIONS
LAW OF TORTS
PART III
LEGAL CAUSE AND NEGLIGENCE

(*The numbers refer to the numbered sections in the text.*)

1. Can you undertake to say what was *the* cause or what were all the causes of such an event as the Civil War, or the election of Woodrow Wilson as President?
2. What was the legal cause of the freeing of the slaves in the United States?
3. Was the attack on Fort Sumter the cause of the freeing of the slaves? "But for" it, they would not have been freed when they were.
4. X slandered Y, and Z repeated the story to A, B, and C, who ceased to trade with Y. From whom can Y recover for this damage?
5. Jones, as a "joke," told Mrs. Smith that her husband had been hurt in a wreck. Mrs. Smith fainted and suffered nervous prostration. Is this result remote?
6. Green, in Indianapolis, carelessly left Brown's stable door open, so that Brown's horse got out. A mountain lion, which had at about the same time escaped from a menagerie, met the horse and killed it. Is Green responsible?
7. (a) White was a great sufferer from rheumatism. He was injured in a collision and his sufferings were much aggravated by rheumatic complications which ensued. Should this additional pain be an element in his recovery? (b) C negligently discharged a gun in a grandstand at the races. The ball bounced on a seat, was deflected at an angle, and struck B who was behind a post and not visible from where C sat. Can B recover from C?

8. Black entered Coast's barn and stole some harness. He left the door open in going out. A storm came up most unexpectedly, and the wind, finding an entrance, lifted off the roof. Is Black liable for this loss? Would he be liable for a runaway caused by Coast having to use some old, defective harness next day to drive to town with?

9. (a) Trains were prohibited by a city ordinance from running faster than six miles an hour in the city limits. A train running at thirty miles an hour came to a crossing just as a runaway team tried to cross. The engineer, as soon as he saw them, tried to stop, but the horses were struck and thrown thirty feet, against the plaintiff. Can he recover from the railroad?

(b) A statute provides that one who sells liquor shall "be liable for all damages caused thereby." The defendant sold liquor to X, who became deeply intoxicated and shot Y. Running to escape the officers, X fell into the river and was drowned. Can X's wife, or Y, recover from the defendant?

10. Holmes knew that small boys frequently stole apples from his orchard. He poisoned some apples on the trees. The boys stole the apples and sold them to the plaintiff, who was made ill. Can he sue Holmes?

12. Knowing that Steele, an old enemy of Waite's, was in the vicinity, Crook gave Waite a quantity of whiskey so as to make him quarrelsome. Waite picked a quarrel with Steele, who shot him. Is Crook responsible?

13. Bowen made a daredevil balloon ascension on a windy day. His balloon caught on a live electric wire and exploded. Parts of it fell on the roofs of several structures and set them on fire. Is Bowen liable?

14. Hall, in the daytime, slid down a much-used street on a bob-sled. He collided with a team. The sled continued to go forward and crashed through a window. The glass fell down through a cellarway into the basement where Turner was, and cut him. Is Hall liable to him?

16. The Y Railroad in September promised to provide cars to ship X's potatoes on the first day of October. It failed to provide the cars until October 16, and the potatoes were frozen in transit. Can X recover for the loss?

17. A freight train was six hours behind time, owing to a negligent collision between two other trains, when it was overwhelmed in a landslide from a mountain beside the track. Is the company liable to the shippers for the loss of the freight?
18. The city built a bridge over a creek and allowed the railing to become defective. A severe flash of lightning caused A's horse to shy so that B's horse was crowded over against the railing. It gave way, and B was thrown off the bridge. Can he recover for his injuries from the city?
19. By the negligence of the defendant, a lamp blazed up in its railroad car. The plaintiff was frightened and tried to go into the coach ahead. She fell between the cars in doing so. Is the defendant responsible for these injuries?
20. A truck was carelessly driven in front of an electric car. The motorman made no effort to jump, as he could have done easily, but stayed on the car and tried to stop it, although he saw there was little chance to do so. Can he recover for injuries sustained in the collision?
21. A small boy negligently set a boat adrift in a river. The owner jumped into the water to recapture it, and was drowned. Is the boy responsible for his death?
22. A boy threw a brick through the plaintiff's window. The plaintiff did not replace the glass, and a month later a storm deluged the interior of the house. Is the boy liable for the harm occasioned by the storm?
23. Wells negligently left his high-spirited horse unhitched in the street. The animal started to walk off. Wilcox, who was at hand, could by reaching out have stopped the horse without the slightest danger, but did not. The horse soon began to run and ran down Clark. Can Clark recover from Wells?
24. The K Ice Co. negligently dropped a block of ice off its wagon and left it lying in the middle of the street. Myers, who passed by, was fearful that some one would run into the block, and pushed it over against the curb. At dusk Cook drove up to the curb to hitch his horse, did not see the ice, ran into it, and was upset. Can he recover against the ice company?
25. Wallace, by negligence, fired the plaintiff's house. Hose

was laid across the street car track to the nearest hydrant and the fire was under control, when a street car ran over the hose. Before a new one could be obtained, the house burned. Can the plaintiff recover against either Wallace or the street car company?

26. Brunt carelessly threw a rock through Wilde's window and shattered it, leaving jagged pieces of glass about the edges of the fracture. Wilde failed to fix the window and a strong breeze one day caused a piece of the glass to fall out upon the plaintiff. Can he recover from either Brunt or Wilde?

27. (a) The defendant falsely asserted that Mrs. Jones had been guilty of adultery with X. Mr. Jones thereupon filed a bill for divorce against Mrs. Jones. Can she recover from the defendant for this element of her damage?
(b) C carelessly left his loaded gun where a child ten years old found it. The boy then discharged the load at a dog and killed it. Can the owner of the dog sue C?

28. The defendant negligently piled iron on a dray. A meddler, who saw that the iron would fall and make a noise, purposely moved the tongue of the dray to make the iron fall. It struck the plaintiff. Can he recover from the defendant?

29. The defendant sold laudanum to the plaintiff's wife, knowing that she drank it and that it injured her health. Her husband sues for the loss of her services. Can he recover?

30. The defendant kept a baseball park. Balls were frequently knocked over the fence and upon the plaintiff's grounds. The defendant allowed all small boys who retrieved the balls to come in free. Many of them went on the plaintiff's grounds to recover the balls. Is the defendant responsible for their trespasses and for injuries done by the balls in alighting? See also question 12.

31. The defendant negligently allowed oil to drip from barrels on a platform where he kept it for sale. A passer-by dropped a match without blowing it out. It fell on the greasy boards and ignited them. The fire spread to the plaintiff's house, two doors away. Who should decide whether or not the defendant is liable—the court or the jury?

32. Define negligence.
33. Acres saw Barr's horse walking away from the curb and saw that it would run away unless he stopped it, which he could have done with a very slight effort and at no risk. He did not stop the horse. It ran away, broke the buggy, and injured Berry. Can either Barr or Berry sue Acres?
34. Blythe saw that a horse standing at a post had gotten its foot over a hitching-strap and was in danger of breaking its leg. He therefore loosened the strap and went away, leaving the horse untied. The horse soon walked off and then ran away. Is Blythe liable for injuries sustained by the horse or by a person struck by it?
35. A statute imposed a penalty on all coal mine operators who did not fence any "slack-pile in such a manner as to prevent loose cattle or horses from having access to it." The defendants dumped slack on their open lot and the plaintiff, a boy, stepped into it. He was burned, as the pile was in a state of slow combustion. Can he recover from the defendant?
36. The Gas Ornament Co. hung a defective chandelier on the ceiling of the N. & W. Railway station. It broke of its own weight and struck a person who was in the station to take a train. Can he recover from the gas company?
37. The plaintiff found a bottle labeled "Paregoric" in his cupboard, left there by a former tenant, and took some of it. The bottle had been refilled by a druggist, for that tenant, with muriatic acid, without relabeling it. Is the druggist liable to the plaintiff?
38. The X Water Company advertised that it sold "sterilized water." In fact, it filled its bottles from the regular city supply. Brooks bought a case of this water and presented it to Rivers, who contracted typhoid from its use. Can he recover from the water company for his illness?
39. The defendant in erecting a building had excavated for the foundation up to the sidewalk. He hung two red lanterns at either end to warn passers-by. The wind blew the lights out, and the plaintiff, not observing the excavation, fell into it. Can he hold the defendant under the circumstances?
41. Dunn saw two hunters going across his land, where an old

cesspool lay, but did not warn them of it. They fell in and were hurt. Is he liable to them?

42. Ferguson was cleaning ice off the roof of his house. He saw a tramp coming to the door, who evidently did not see him, and continued to throw down the ice. Some of it struck the tramp. Is Ferguson liable to him?

43. The defendant owned a concession at Coney Island called "The Revolving Saucer." This was a disk in which persons could sit and be rapidly whirled around. The plaintiff, aged ten, in the morning, before the place was open, came in and started to revolve the disk. In doing so he hurt himself. Is the defendant liable to him?

44. Trespassers for many years had taken a short cut across the railroad company's yards, despite notices to keep out. An engineer was driving his engine through the yards without keeping a lookout, when his engine ran over the plaintiff's foot, which had got caught in a frog. Is the company liable to him?

45. The defendant opened a quarry on his unfenced property. The plaintiff, who lived beyond these lands, had previously been given permission to cross whenever he chose. He did not learn of the quarry until he fell into it one dark night. Can he hold the defendant?

46. The plaintiff paid 75 cents to sit in a grandstand at a football game. It was old and rickety, and fell when the crowd stamped upon it during the excitement of the game. Can the plaintiff hold the defendant for his injuries? Could he if he was one of those who stamped?

47. (a) Mrs. Johnson went to the "Fair" store to buy some buttons, but could not find the sort she wanted. As she came out, she fell down an unprotected hatchway. Can she hold the proprietor liable?

(b) Mr. and Mrs. Bright went to call on Mr. and Mrs. Glover at 8:30 p. m. The Glovers had built up a barricade to keep people from tramping on a fresh cement walk. Mrs. Bright did not see this, and fell upon it. Is Glover responsible for her injuries?

48. A statute required all builders to cover the joists of buildings in process of erection with boards to prevent workmen from falling through, "under penalty of $100 for

every offense." The defendant did not do so, and the plaintiff fell through. Can he hold the defendant? (See also Question 35.)

49. A statute provides all railroads "shall blow a whistle at a point 100 yards before reaching any public crossing." The engineer in the cab fell dead of heart disease as he was reaching for the whistle cord, and the whistle was not blown. The plaintiff, who was crossing the track, was struck by the engine. Can he recover from the railroad?

50. Suppose, in the preceding case, that the plaintiff was stone-deaf and would not have heard a whistle. Would this affect his right to a recovery?

51. (a) The captain of an ocean liner was trying to make a record on the vessel's maiden voyage. Although he was told that there were icebergs ahead, he ran at full speed. The vessel struck an iceberg and was lost. Can the plaintiff, as administrator of a deceased passenger, recover double damages under a rule allowing such if the injury is "wilfully inflicted"?

(b) An engineer decided to take a short nap on a railroad running over a prairie. He awoke to find the engine striking a cow which had wandered on the track. Can the owner of the cow recover for its loss?

52. A tried to pass B on a narrow road, knowing that it was hazardous to do so, but thinking he saw a chance to get by. B became excited and pulled the wrong rein and a collision ensued. Can B recover from A?

53. An elevator man failed to reverse the lever when his car reached the top floor. The elevator struck the top, rebounded, and fell to the bottom. Is this misfeasance or nonfeasance?

54. A physician, called up at 2 a. m., promised to come to B's house, but never did so. B died from lack of medical attention. Can B's administrator hold the physician in a tort action?

55. A specialist in abdominal surgery in a certain operation used the skill which the average physician of his community used, but not his customary skill. Is he liable for unfortunate results which would have been avoided by the exercise of that skill of which he was capable?

56. The defendant who was driving a country horse to town for the first time, on approaching a street car, continued an argument with his companion and held the lines in one hand. The horse ran away and struck X. Is the defendant liable to X?

57. The supervisors of a county built a bridge across a brook, but failed to place upon its sides any guards or barriers. The plaintiff drove a one-eyed horse, which got too near the edge, and fell over. The court instructed the jury that the plaintiff could recover only if the supervisors were guilty of "gross negligence." Is this instruction correct?

58. The defendant owned a stallion which had shown no vicious habits. The defendant turned the stallion loose in the stable yard. The animal jumped over a low fence and attacked the plaintiff's mare. The court instructed the jury that the defendant was required "to use every care to keep the animal under restraint." Was this instruction correct?

59. Winsor was deaf, and started to cross a city street. The driver of an approaching car sounded his gong, expecting Winsor to get out of the way. Winsor failed to hear the bell, did not get off the track, was run down, and sued. How should the court instruct the jury as to Winsor's duty to use care?

60. A child of ten, brought up in the country, went to the city for the first time, became bewildered in crossing a crowded street, and was struck by an electric car. What was his duty as to using care? What if he were five years old?

61. Willie Jones was careless in shooting at a quail. The shot shattered a neighbor's window and a few spent shot struck a caller, inflicting no harm, excepting a temporary sting. Can the caller successfully sue Willie?

62. Who determines the liability of the defendant in the 56th question?

63. Kellogg's body was found with a fractured skull underneath an elevated railroad. It was proved that Kellogg boarded elevated train No. 172, and that train No. 172 lurched in going around the curve where the body was

found. This was all the evidence. Should the case go to the jury?

64. The plaintiff was passing in front of a warehouse on a dock when he was hurt by several falling bags of sugar. Does he have to prove that some one was negligent in handling the sugar in order to recover?

66. Dean drove on the wrong side of the street. Weld was riding a bicycle from the opposite direction, without a light. It was dark, and neither saw the other. They collided and Weld was hurt. Can he hold Dean?

67. The defendant's engineer closed his eyes to take a nap while running the engine. The plaintiff, being absorbed in his own thoughts at this time, stepped on the track without noticing where he was. Can he recover for any harm he sustains?

69. A twelve-year-old boy jumped on the front step of a moving car. The motorman saw that the boy had but a slight hold and was slipping, but he made no effort to stop the car. Can the boy hold the street car company for the injuries he suffered?

70. The plaintiff drove on a street car track and did not look back as he jogged along. The brakes on the defendant's car failed to work and the motorman lost control of the car. It ran into the plaintiff's wagon, although there was time to get out of the way if the plaintiff had paid any attention to the cries of by-standers. Can the plaintiff hold the car company?

71. An engineer was watching the sunset and did not see a boy who was picking up some fragments of coal on the track, until it was too late to stop the train or give warning. Is the company liable to the boy on the theory that if the engineer had been watching he would have had plenty of time to warn the boy or to stop?

73. Davies turned his cow into the highway, and Mann left a garbage wagon loaded with spoiled vegetables along the road. The cow ate the vegetables and died from the poisons in them. Can Davies hold Mann?

74. The "Phoebus" had a cracked whistle and the "Venus" a defective rudder. The vessels approached one another, when the pilot of the "Phoebus" blew one blast. Owing

to the defect, the sound was like two successive short blasts, and the pilot of the "Venus" turned the helm according to such a signal. Observing a collision imminent, the "Venus" tried to turn the other way, but the defective rudder broke. Can the "Phoebus" recover for its injuries in the collision?

75. The plaintiff saw a wire on the ground, but did not walk around it. The wire was live, and the plaintiff was shocked. Can he hold the electric light company through whose carelessness it fell?

76. The plaintiff drove rapidly through an unlighted alleyway and tipped over on a pile of ashes that had been placed there by the defendant. The plaintiff knew that many persons deposited their ashes in alleys, but did not look ahead to see whether any ashes had been placed in this alley or not. Is he barred by this failure?

77. X negligently dropped a lighted lamp and the house in which he roomed caught fire. Mrs. Z was on the top floor and could not escape. Y rushed into the house when the room seemed about to fall in and rescued her, but was badly burned. Is X liable to Y?

78. A statute required all owners of threshing machines to box the "tumbler" on the machines. Smart did not do so, and Jackson, who carelessly leaned back upon the thresher, was hurt. Can he hold Smart for his injuries?

79. The conductor on a railroad kissed Miss A, a passenger. He testified that she had flirted with him until he thought that she would not mind his advances. Would conduct of the sort testified to bar her from a recovery against him?

80. (a) Statutes required all persons about to cross a track "to stop, look, and listen." The plaintiff did not do so, and was struck by a train which suddenly swung round a sharp curve, hidden by an embankment. Is the company liable to the plaintiff?

(b) Two boys went out to charivari a newly married couple, and, in shooting a revolver, one carelessly shot the other. Is he liable to the other?

81. Two fifteen-year-old boys went hunting rabbits on Sunday in a state where all shooting of firearms on Sunday was prohibited. One carelessly shot the other. Can the latter

hold the former? Would it be different if the statute prohibited any person under sixteen from shooting firearms?

82. A's chauffeur, in driving A to work, did not look when he was passing around the end of a wagon, and ran into Smith's team. If Smith were not negligent, could he hold A for any injuries he sustained? If Smith were negligent, could A hold him for any injuries that A sustained?

83. X, being tired, called a public cab, told the driver to take him home, curled up on the seat inside, and went to sleep. The driver was careless, as was the motorman on a street car, and in the ensuing collision X was hurt. Can he recover from the street car company?

84. At a picnic, the men built the fire and the ladies set the table. One of the men, who agreed to put out the fire, carelessly left embers burning, which set fire to the woods. The fire spread to the homes of one of the men and one of the women of the party. Is either barred from a recovery?

85. A nurse girl talked so long and interestedly to a park policeman that she did not notice that her charge, a six-year-old boy, had wandered out on the carriage road. He was struck by a passing vehicle, carelessly driven. Is he barred from a recovery?

86. Mrs. X stepped off a street car backward at the instant that the car started with a jerk. The motorman had not waited for a signal from the conductor. She was hurt badly. Can Mr. X recover for the loss sustained in having to hire a servant to do the regular housework?

87. Mr. and Mrs. Jones found themselves on a rickety sidewalk. Mr. Jones became so interested in looking at a squirrel that he did not watch his footsteps. He stepped on the end of a loose plank. The other end flew up and tripped Mrs. Jones, who fell and was permanently hurt. Is she barred by Mr. Jones' conduct?

88. Could Mr. Jones recover in the preceding question for the loss of Mrs. Jones' society and services?

QUIZ QUESTIONS*
LAW OF TORTS
PART IV
DECEIT

(*The numbers refer to the numbered sections in the text.*)

1. What is meant by deceit as a tort?
2. May B, who influences the conduct of A by deceit, thereby incur a tort liability toward other persons than A?
3. What elements are essential to liability for deceit?
4. How far, if at all, is intention to be considered as an element in an action of deceit?
5. (a) What is the effect of deceit as between the immediate parties to the contract? (b) What is the effect, if any, as to third parties in cases where deceit has been practiced?
6. May a mistake under any circumstances form a basis for an action of deceit?
7. A, who is the agent of B, has during the due course of his employment purchased a horse for the use of B. A knows that the horse is not fitted for the purposes for which his principal desires to use him. Is B bound to accept the animal and pay the purchase price?
8. Distinguish between active and passive non-disclosure of facts upon which an action of deceit might be based.
9. Can a person become liable in an action of deceit by mere conduct, silence or other non-interference which would wrongfully tend to create a misrepresentation?
10. To what extent may the surrounding circumstances and the understanding of the parties with reference to the representation be taken into consideration in determining whether deceit was practiced?

* Prepared by the Editors.

11. If the person upon whom the duty rests to make a full disclosure, fails to make such disclosure, what is the effect of a resulting misunderstanding?
12. Can statements as to events which may happen in the future form the basis of an action of deceit?
13. To what extent, if at all, and under what circumstances, if any, can the expression of an opinion be made the basis of an action of deceit?
14. A, who is not a dealer, offers to sell certain furniture to B, representing to B that such furniture is of the value of $500. B, knowing all the facts, examines the furniture and purchases the same at aforesaid price and gets a bad bargain. Is A liable at the suit of B in an action of deceit?
15. What is meant by culpability, and to what extent must the defendant be culpable before incurring liability in an action of deceit?
16. Smith obtains from Robinson, who is vice-president of a reputable banking institution, a statement that he, Smith, is reliable and responsible. It turns out that he is neither. The party to whom Smith gave this recommendation and who, relying upon it, gave Smith credit, brings action against Robinson for deceit. Under what circumstances, if any, can he recover?
17. Doe represents to Roe that Boe is financially responsible, upon the faith of which representation Roe extends credit to Boe; Boe defaults; Roe sues Doe in an action of deceit. Doe pleads the truth of his representations. For whom should judgment be given? State reasons.
18. Define scienter and state its application in the law of torts to deceit.
19. White makes actionable misrepresentations to Black upon which Black relies. Black brings an action for deceit against White, but is unable to establish any measure of damages. Can Black maintain the action?
20. Wade offers to sell to Slade certain books which he represents to be a London edition of Dickens' works. The books are presented to Slade before the purchase is concluded, whereupon Slade closes the deal and pays the purchase price. The books were not a London edition. In an action of deceit against Wade can Slade recover?

QUIZ QUESTIONS
LAW OF TORTS
PART V
DEFAMATION

(*The numbers refer to the numbered sections in the text.*)

1. (a) What difference do you notice between the popular meaning of the word "defamation" and its meaning as a law term? (b) In what division of torts would you place the tort of defamation?
2. Can a statement be legally defamatory if it does not assail the reputation?
3. (a) Distinguish defamation as a tort from defamation as a crime. (b) Distinguish slander and slander of title. (c) D wished to marry P, a young lady, but thought that she preferred S. He therefore said to S that P was engaged to him, D, and that they would be married shortly. S believed him; ceased paying attention to P, and afterwards married another woman. D's statement to S was entirely false, and made with a view to preventing a marriage between P and S. Can P sue D for defamation?
4. D said of P, a nine-year-old child, "He stole my watch; he is a regular little thief." Can P sue D for defamation?
5. A reporter to a New Orleans paper stated that Mr. N, "a cultured gentleman," had made an eloquent address. The typesetter, through a mistake, set up the description as "a colored gentleman." This was changed by the proofreader to "a negro." The report was so published wholly through mistake on the part of everyone concerned, and without any knowledge that Mr. N was a white man. Is

there defamation in this? May the corporation owning the paper be sued by Mr. N?

6. How many species of defamation are there?
7. D, at the seashore, in the presence of others, wrote on the sand a defamatory statement concerning P. Is it libel or slander?
8. How many kinds of slander are there?
9. What is the general scope of libel?
10. What elements must appear in the plaintiff's declaration, complaint, or petition in defamation?
11. (a) D said of P in a public church meeting: "He smells strongly of brimstone." Is this actionable defamation? (b) D said of P, a physician, "Dr. P killed my children. He gave them a teaspoonful of calomel, and it killed them." Is this actionable defamation?
12. D said of P, "Your boy, Ben, is a thief; he stole $20 from the grocery store." Can P sue for defamation?
13. D met P as they two were crossing a field and charged him with having stolen $5 from S. What, if anything, is necessary to make this actionable defamation?
14. In an action for libel the plaintiff alleged that the statement was false. The defendant put in a general denial. Must the plaintiff prove the falsity of the statement?
15. A newspaper published a statement that one "John Jones was wanted by the police" for theft. The reporter had written "James Jones," the word "John" getting in by accident. James Jones was wanted by the police for theft; but John Jones was innocent. Has the paper a defense against the suit of the latter for defamation?
16. Wishing to obtain the advice of S, on the question whether D should tell P of a scandal in circulation about her (P), D repeated the defamation to S. Can P sue D for slander?
17. P sued D for slander but offered no evidence of having sustained any damage. Can he recover?
18. State briefly what the plaintiff must allege and prove in order to obtain a judgment for defamation, if the defendant offers no evidence.
19. Mention briefly the different kinds of response open to a defendant in an action for libel or slander.
20. The plaintiff sued the defendant for saying of him that he

had beaten a horse to death. The defendant answered that the charge was true, and on the trial proved that the plaintiff had beaten the horse severely. But the defendant was unable to prove that the horse had died from the beating. Is this defense good?

21. A daily paper published a report, obtained by its police reporter, that P, described as the agent of an express company, had left town, and was being sought by interested people. In P's suit for libel, the owner of the paper claimed a privilege, as serving the public. Is the defense good?
22. Illustrate the difference between "fair comment" and "unfair comment."
23. In what way is malice of real importance in slander and libel?
24. Give an illustration of excess of privilege.
25. P wished to obtain an injunction restraining D from circulating defamatory statements about P. Can this injunction be obtained?
26. Designate the various kinds of damage which are recognized by the courts in defamation actions.

QUIZ QUESTIONS

LAW OF TORTS

PART VI

MALICIOUS PROSECUTION

(*The numbers refer to the numbered sections in the text.*)

1. (a) What is the purpose of Tort Law?
   (b) As a general rule, does the law of torts take into account motive in determining liability for actual damage? Why?
   (c) What class of cases constitutes an exception to this general rule?
   (d) Does malicious prosecution fall within the rule or the exception? Why?
2. (a) What is a malicious prosecution?
   (b) Analyze the definition you have just given and show that it includes every essential element of malicious prosecution and excludes all other ideas.

3-4. (a) What is a judicial proceeding?
   (b) What are the reasons why the English courts ordinarily refuse to allow damages for the improper prosecution of civil suits?
   (c) Can the prosecution of a criminal case in a court which does not have potential jurisdiction of the offense charged, ever be made the basis of an action for malicious prosecution? Why?
   (d) Do the same rules and reasons apply as to cases in courts having jurisdiction of the offense charged but in which the charge is made in a manner prohibited by law? Why?

(e) When is the complaining witness regarded as responsible for the criminal proceeding and when is the prosecuting officer so regarded?

5. (a) What is the probable cause?
(b) Why is it essential that there shall be no probable cause for the prosecution charged to be tortious?
(c) What matters of public policy enter into this requirement?

6. (a) What is malice in this connection?
(b) Why can the institution of a criminal case in order to compel the defendant to pay a debt justly due from him be regarded as malicious?

7. In what ways and to what extent must the rights of the person seeking damage have been interfered with in the former proceeding?

8. (a) Why must the proceeding on which the suit for damages is based have terminated before the suit for damages can be maintained?
(b) Express in your own language what is meant by the termination of the former proceeding. Cover both proceedings in courts having final jurisdiction and proceedings before committing magistrates.

9. (a) What are damages?
(b) What items of actual damage are ordinarily recoverable in an action for malicious prosecution?
(c) Why are exemplary damages ordinarily recoverable in such suits?

10. (a) Who is responsible for the damages occasioned by the malicious prosecution?
(b) If a prosecution is instituted maliciously and without probable cause, but in the regular way in a court of competent jurisdiction, and a writ is regularly issued commanding the arrest of the defendant, can the officer executing the writ be held liable for making the arrest? Why?

11. (a) Why is the remedy for malicious prosecution by "action on the case" instead of "trespass"?
(b) What should the plaintiff's pleadings in such a case set out?
(c) What should be covered by the defensive pleadings?

(d) How do the rules of evidence in these cases compare with those that govern in ordinary civil litigation?

(e) How can want of probable cause be proven?

(f) What is meant by the advice of counsel?

(g) Who is entitled to give such advice?

(h) On what facts must such advice be based?

(i) Why do some courts distinguish between the advice of private counsel and the advice of the state's prosecuting officer?

12. Compare and contrast malicious prosecution and false imprisonment.

QUIZ QUESTIONS

LAW OF TORTS

PART VII

INTERFERENCE WITH DOMESTIC, CONTRACTUAL AND BUSINESS RELATIONS

(*The numbers refer to the numbered sections in the text.*)

1. (a) What are included in the domestic relations? (b) What is the distinction between status and contract?
2. (a) Define consortium. (b) A and his wife were physically injured through the negligence of a railroad company. A brought suit and recovered damages for his own injuries. He now brings suit for loss of services and society of his wife, and medical expenses during her illness. May he recover?
3. B so influenced her son, C, as to alienate his affections from his wife, A, and he left her and went to his mother's home. Several years later he began suit for divorce. A now sues B for loss of her husband's affections and society. Is the action maintainable?
4. May the unmarried mother of an illegitimate child recover for loss of services and for expense caused by injury through negligence?
5. Is an action for seduction of his minor daughter maintainable by a father, when the daughter is employed by a third person, but visits home occasionally?
6. A employed laborers to work on his farm, under written contracts, whereby they were to receive part of the crops for their services. B enticed them away and kept them in

his own service for ten months. Is an action by A against B maintainable?

7. What are the three important English cases bearing on the question of the right to non-interference in contract relations? What do they establish?
8. A's child died and he made a contract with C to furnish carriages for the funeral. In order to punish the undertaker employed by A, B, the officer of the union, persuaded C to take away the carriages from the door of A's house. Has A a right of action against B?
9. What is the meaning of malice and maliciously when used in declarations charging interference with contract relations?
10. May nominal damages be recovered for interference with contractual relations, when the plaintiff cannot prove substantial damages?
11. What is the principle on which a tort action for interference with business or employment may be founded?
12. Who are the persons concerned in the question whether the law will recognize a tort for interference with business and employment?

13-14. What are the views of some of the great judges as to the character of the right to non-interference in business or employment?

15. What are the questions involved in the decision of whether plaintiff can recover in an action for interference with his business or employment?
16. State the theory of the doctrine of justification.
17. Give the substance of Justice Holmes' view of the doctrine of justification.
18. Give the substance of Lord Bowen's view of the doctrine of justification.
19. What is the earliest known case on the question of competition as a justifying cause in interfering with a man's business? What is the leading modern case?
20. What were the facts in the Mogul case, and what was the tenor of Lord Bowen's argument on the subject of fair and unfair competition?
21. The defendants combined as manufacturers to refuse to sell to the plaintiff, a wholesaler, except at retail prices.

Their reason was that the plaintiff had refused to maintain the price agreed upon in selling goods bought by him of the defendants. Was this actionable?

22. By analogy to the case in the text, would you say that the plaintiff could enjoin the defendant from erecting the fence in the following case? Defendant was proceeding to erect a high tight-board fence on a vacant lot belonging to him, solely from the malicious motive of shutting off the light and air from plaintiff's premises.
23. B was a corporation engaged in shipping logs. It maintained a store. It issued to its employees checks good for merchandise at the store. These checks were marked "not transferable," but B had been in the habit of redeeming them from any one into whose hands they passed. A conducted a store similar to B's, and had received a large number of B's checks in payment of purchases by B's employees. B now threatens to discharge any employee trading with A, and refuses to accept any checks from A. Has A an action against B?
24. State Professor Wyman's view of the rule of unfair competition.
25. Give Bailey, J.'s, distinction between malice in a popular and in a legal sense.
26. What is the substance of Lord Bowen's statement of the meaning and import of malice?
27-28. Explain the source of confusion in the use of the word malice, and the proper way to avoid such confusion.
29. How is the view expressed, that the act of a combination is no more than the acts of the several members of the combination?
30. What are the views expressed in Quinn v. Leathem on the character of the acts of a combination?
31. What is Mr. Stimson's argument on the character of combined action?
32. All the railroad companies in a certain territory had agreed among themselves to refuse employment to any man who was reported to a joint blacklist office which the railroad companies maintained. Plaintiff showed that he was refused employment merely because of the agreement of this combination. Has he ground of action?

33. A retail lumbermen's association desired to confine the wholesalers to selling to retailers who had regular yards. The association said that any wholesalers who sold to mere agents not having regular yards must pay a fine, or else the members of the association would not continue to deal with such wholesalers. A was a lumber agent, without a regular yard. Because of this rule wholesalers refused to deal with him, whereby his business was greatly injured. Has he a right of action against the retailers' association?
34. A was a wholesale lumber dealer. B was a member of an association of retail lumber dealers. A rule of the association provided that when any wholesaler sold direct to a consumer, he should pay to the association ten per cent of the price received, and if he did not do so, no member of the association should deal with such wholesaler on pain of expulsion. A refused to pay the fine and asked for an injunction to restrain the officers of the association from notifying members not to deal with him. Should the injunction be granted?
35. An association of undertakers provided by their rules, among other things, that no member of the association should render services to any person who was indebted to any member. A's wife died and all the members of the association refused to provide for her funeral because of A's indebtedness to one member. Has A a ground of action?
36. B was the publisher of a well-known advertising sheet which purported to give the public a full list of all express companies. At the instigation of C and D, rival express companies, in order to control and monopolize all the express business, B omitted the name of A, a reputable express company, from the list. A brings suit by injunction to prevent defendants, B, C and D, from procuring this wrongful kind of publication in the future. Is the action maintainable?
37. Define strikes.
38. Are strikes lawful?
39. (a) Who has the final determination as to the legality of a strike? On what principles will the determination

be made? (b) Plaintiff was a member of the defendant union, but was in arrears for dues. Defendant, by threats to strike, induced plaintiff's employer to discharge him. Was this a justifiable threat to strike?

40. What is a sympathetic strike? Is it legal?
41. Will threats, intimidation, and disorder render a strike subject to injunction?
42. Define boycott.
43. Distinguish primary and secondary boycotts.
44. What are the principal methods pursued by boycotts?
45. The complainants had been members of the labor union and had resigned because they objected to the way the moneys of the union had been expended, namely, in connection with a municipal campaign. The union demands the discharge of complainants under threat of a strike and boycott of their employers. May the action of the union be enjoined?
46. A, a master printer and owner of a newspaper, had a dispute with B et al., the members of a local typographical union, over the terms of employment in A's shop. B et al. sent circulars to the advertisers in A's newspaper to the effect that, if the recipients continued to advertise in A's paper, B et al. would not buy from them. The threat was effective. May A secure an injunction restraining B et al. from continuing to send out such circulars or from making similar threats?
47. Defendant was a labor union; plaintiff was a manufacturer of casks. To coerce plaintiff into ceasing to use certain hooping machines, defendant instituted a boycott against the persons supplying him with necessary materials. Is the conduct of the defendant actionable?
48. Define picketing, and state the rule as to its legality.
49. What means used will make picketing unlawful?
50. What is the argument of those who hold all picketing to be unlawful?
51. What are the conditions necessary for recovering in an action of slander of title?
52. V bought of A certain lots. When the market price was greatly enhanced and V was on the point of reselling. A falsely and maliciously caused himself to be made a

party to a suit in partition whereby he denied V's title. This action prevented V from selling the lots until their price had greatly depreciated. May V maintain an action of slander of title against A?

53-54. H and W were rival manufacturers of paint. W published a circular in which it was stated that experiments had been made as to the relative merits of H's and of W's paints, with this result: "Judging from the finished work, it is quite evident that W's zinc has a slight advantage over H's." H maintains that his paints are superior, that the experiments were not fairly made, and that he has suffered damage. May he recover in an action of disparagement of goods?

QUIZ QUESTIONS

LAW OF TORTS

PART VIII

RIGHT OF PRIVACY

(The numbers refer to the numbered sections in the text.)

1. What are the principles underlying the right of privacy?
2. What has been the development of the common law in respect to personal rights?
3. Where and when was the doctrine of a right of privacy first formulated?
   Was the right of privacy recognized before 1890?
4. Give descriptive definitions of the right of privacy. Would "immunity from wrongful publicity" be a more accurate expression?
5. What is the analogy between the right to privacy and the right to intellectual and artistic property?
6. Distinguish between the right to privacy and the right to reputation.
7. Summarize and classify the decisions involving the question of a right of privacy.
8. What were the facts and the several judgments in the case of Schuyler v. Curtis?
9. Compare the cases of Schuyler v. Curtis and Corliss v. Walker.
10. Compare the case of Atkinson v. Doherty with those of Schuyler v. Curtis and Corliss v. Walker.
11. What were the facts in the case of Roberson v. Rochester Folding Box Co.? What were the several judgments in this case? How did the judges stand on the question involved?

12. What were the grounds on which the majority of the Court of Appeals denied the existence of a right of privacy?
13. What were the grounds on which the minority of the Court of Appeals contended that the right of privacy should be admitted?
14. What were the facts in the case of Pavesich v. New England Life Insurance Co.? What was the argument of Justice Cobb in favor of the right of privacy? Compare the Pavesich case with the Roberson case (§§ 11, 12, 13).
15. Give the position of the court in the Pavesich case.
16. What was the view of the New Jersey court in the case of Edison v. Edison Polyform Manufacturing Co.?
17. Compare the case of Henry v. Cherry with the Roberson case (§§ 11, 12, 13) and the Pavesich case (§§ 14 and 15).
18. What did the court hold in the case of Foster-Milburn Co. v. Chinn?
19. What did the court hold in the case of Munden v. Harris?
20. What was the attitude of the Washington court in the case of Hillman v. Star Publishing Co.?
21. What were the facts in the case of Douglas v. Stokes? What was the ruling of the court?
22. What are the different views as to the power of a court of equity in new cases?
23. Is a property right involved in the right of privacy?

24-25. May a court of equity intervene to protect personal rights?

QUIZ QUESTIONS

LAW OF TORTS

PART IX

EXTRA-HAZARDOUS OCCUPATIONS—ACTING AT PERIL—INSURING SAFETY—MISCELLANEOUS

(The numbers refer to the numbered sections in the text.)

1. Does the law concern itself with all classes of wrongs? If not, then when will it afford redress?
2. What is meant by "acting at peril?" Give some instances.
3. What is meant by "assumption of risk," in case of an employee?
4. A and B are employed by M in the same work. A knows that B is careless, and notifies M, who does not discharge B, nor take any steps to make him more careful. A continues to work for M, and two weeks after notifying M of B's carelessness A is hurt by reason thereof. Was B's carelessness one of the risks of the employment which A assumed? Why?
5. Plaintiff visits B, at his invitation. B is a tenant of defendant, who as landlord had agreed to keep the yard of the house in repair; and while repairing a well in the yard, the landlord left the cover off. Plaintiff, in crossing the yard at night, and while using due care, fell into the well and was injured. Is the defendant landlord liable or not? Why?
6. A horse, which X was riding, without anyone's fault suddenly became unmanageable, rushed from the highway onto A's land, and ran against and injured the person of A.

Can A maintain an action against X for (a) trespass, (b) battery, (c) both, or not, and why?

7. Carroll, a peddler, entered the house of Marcoux, peacefully but without express permission. Marcoux's dog, known to him to be vicious, attacked and bit Carroll; and when Carroll kicked the dog, Marcoux knocked Carroll down. Has Carroll an action? If so, for what?
8. May one be liable in damages even though his act or his use of his property is not in itself illegal? If so, under what circumstances?
9. A takes a large quantity of old papers, etc., into the alley to burn them. There is but little air stirring, but while the papers are burning briskly a sudden gust of wind carries some of the flaming material 25 feet along the alley where it sets fire to some dried grass and refuse, and thence the fire spreads to the adjoining fence and barn. Is A liable for the resulting loss? Why?
10. X sold a pistol and powder to A, who was 9 years old. A took the articles home and gave them to his aunt to keep for him; afterwards the aunt let A have them, and he was seriously injured by them. Is X liable? Why?
11. X places a steam boiler on his premises, which, while in operation, suddenly explodes and injures his neighbor's buildings. No negligence is imputable to X, and the neighbor consults you as to his right of action against X. Advise the neighbor.
12. A buys from B, a druggist, a bottle of rat-poison, which B fails to label as such. A places it in the pantry, and his child, eight years old, searching for jam, partakes of the poison and dies in a few hours. What action, if any, lies against B?
13. X, who was employed to repair M's gas-pipe, did his work so carelessly that the gas escaped. M warned one of his servants of the leak in the pipe, but by a careless oversight failed to notify A, another of his servants, of the danger. A took a light near the leaky pipe, and was greatly injured by the explosion which followed. Has A any remedy against X? Why?
14. (a) A had a house on the edge of his land adjoining B's land. A wrongfully fitted his house with a pipe which

collected the rain water from the roof and discharged it in a stream upon B's land. This continued for about five years, B occasionally objecting, but taking no other steps in the matter. A sold the house to C without saying anything about the pipe. C took possession not knowing anything about the nuisance. Is he liable for its continuance after he took possession? (b) Through A's land runs a small stream; at one point A has deepened a natural depression in the bed of the stream and formed a little fish-pond, placing a weir across the stream below the pond. The stream is not navigable, and A's fish-pond is for his own pleasure, not a means of livelihood for him. B operates a mine above A's land, and drains the mine water into the stream, and as a consequence the fish in the pond die. B might drain his mine water elsewhere, but only at a large expense. Has A any action against B? Why? Would your answer be any different if B had no other place to drain his mine water? Why?

15. What is the duty of one land-owner as to giving his neighbor's land support?
16. Is a boarding-stable in a city a nuisance? Why?
17. Jones and Smith laid a plot to make Robinson intoxicated and then to rob him. They made him intoxicated, but did not rob him, and then laid him on a bench in front of the saloon to sleep off the effects. Two boys passing by amused themselves by focussing a burning-glass upon Robinson's head, which had become wet with liquor. To the boys' surprise, the hair took fire, and Robinson was burned. What action, if any, has he? Against whom? For what?
18. Where two or more unite in committing a tort, what is the rule as to whether they are jointly, or severally, liable? State fully.
19. What test would you apply to determine whether or not two or more persons, tort-feasors, are jointly liable?
20. If two or more are jointly liable for a tort, should the damages be assessed against them in proportional amounts, or not? If not, how should they be assessed? How should exemplary damages be assessed against joint tort-feasors? Why?
21. What is the rule as to one joint tort-feasor compelling his

fellow wrongdoer to contribute a proportion of the amount which the first has had to pay as damages? Give the reason for the rule. If A and B jointly commit a tort as to C, who sues A only for the resulting damages, and B agrees with A to hold him, A, harmless as to any judgment which may be recovered by C, can A enforce such agreement on B's part, and why?

QUIZ QUESTIONS

LAW OF FELLOW-SERVANT AND COMPENSATION

(*The numbers refer to the numbered sections in the text.*)

1. What does this article embrace?
2. What general duty does a master owe for a servant's wrongs to other persons?
3. What is the "Fellow-Servant Rule"? What is its basis?
4. Explain what is meant by fellow-servants.
5. Give examples of fellow-servants in railroad service.
6. Enumerate several instances where railroad employees are not fellow-servants.
7. Give several other examples of those who are and those who are not fellow-servants.
8. What rule governs when the servant of one master works for another master?
9. Are volunteers and "compulsory servants" considered fellow-servants?
10. What is meant by the "superior rank" test of fellow-service?
11. What is the general governing rule as to this test?
12. What is meant by the "different department" test?
13. How are these two tests regarded in the various states?
14. Are those employed by the same master in different work or in different places fellow-servants?
15. Enumerate the duties owing to a servant, whose omission by the master renders the latter liable. Discuss fully the duty as to providing fellow-servants. Explain incompetency; what is its effect?
16. What duty rests on the master to keep things safe?
17. What is meant by the "vice-principal doctrine"?

18. Distinguish a vice-principal from a fellow-servant.
19. What criticism is made of the "superior rank" test?
20. What determines whether a co-servant acts as a vice-master?
21. For what acts does a co-servant make his master liable?
22. Give a summary of the tests used as to fellow-service.
23. What effect does the injured servant's own negligence have on his right to recover damages?
24. What is the result of the master's promise and failure to remedy a defect?
25. May the master by contract relieve himself from liability?
26. On whom rests the burden of proof to establish the master's liability to an injured servant?
27. To what extent is the servant liable who causes the injury?
28. Why has the common law been changed by statute? What additional liability is imposed on the master by the "employers' liability laws"?
29. What are the main provisions of the English Employers' Liability Act?
30. What liability attaches to the master for his own negligence?
31. Distinguish clearly between "employers' liability laws" and "workmen's compensation acts." What effect has the new legislation as to old defenses?
32. Where have such acts been adopted?
33. What is the difference between compensation acts and industrial insurance laws?
34. What are some of the constitutional questions involved?
35. Why were the New York and Montana Acts declared void?
36. Why were the Acts of Massachusetts, Ohio, Washington, and Wisconsin upheld?
37. What are the provisions of the acts in some of the other jurisdictions?
38. Which class of legislation do you consider the better? Why?
39. What is generally provided in the various acts?
40. What is meant by accident and actionable neglect under the acts? What governs the amount of compensation?

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PART I

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CHAPTER I.

TRESPASS TO THE PERSON—BATTERY—ASSAULT—FALSE IMPRISONMENT.

Battery—Examples.

COLE v. TURNER.

6 Modern Reports 149 (Eng.). 1704.

HOLT, C. J., upon evidence in trespass for assault and battery, declared,—

First, That the least touching of another in anger is a battery.

Second, If two or more meet in a narrow passage, and, without any violence or design of harm, the one touches the other gently, it will be no battery.

Third, If any of them use violence against the other, to force his way in a rude, inordinate manner, it will be a battery; or any struggle about the passage to that degree as may do hurt will be a battery.

Battery—Horseplay.

REYNOLDS v. PIERSON.

29 Ind. App. 273, 64 N. E. 484. 1902.

ROBY, J. * * * It was averred in the complaint that appellant, in a rude and insolent manner, unlawfully assaulted

the plaintiff with force and violence, and committed an assault and battery upon him, by reason of which he received injuries to his damage. * * *

There is very little conflict in the evidence. The plaintiff, a man 68 years of age, engaged in business at the Union Stock Yards, in Indianapolis, was standing in one of the alleyways of the Interstate Stock Yards in said city. He was greeted as he came up by one William O. Trotter, who addressed him as "Uncle John," took hold of his left arm or coat sleeve, shook him, and inquired jokingly whether he had come over to the new yards to run them out of business. There were a number of other parties present. Appellant, who was a large man, weighing about 225 pounds, 35 years of age, came walking briskly down to the yards from the office building, and as he passed Trotter, who was still holding Pierson's arm or sleeve, appellant took hold of his arm and jerked and pulled him with sufficient force so that Pierson, upon whose arm Trotter retained his hold, was thereby thrown and injured. Appellant passed on down the alley, and did not at the time notice that Pierson was thrown or hurt.

The appellant's claim is: That no intention to injure Pierson existed; that he was on good terms with both Pierson and Trotter. They were—he and Trotter—accustomed to the kind of greeting and sport appellant attempted to engage Trotter in. It was their usual and customary greeting. That the injury suffered by plaintiff was an extraordinary, unusual, and unnatural result, and not such as might have been reasonably expected from the act, and therefore not the proximate effect of the act complained of; that the injury was the result of a pure accident.

The facts shown are sufficient to condemn the habit of so-called "horse play" between grown men. The defense relied upon has been many times tersely expressed by younger people in the phrase, "I didn't mean to." Plaintiff was injured through no fault of his own. His right to be secure in person was violated. The appellant was responsible therefor. His act was the primary cause of the plaintiff's injury. The verdict of the jury is not, therefore, unsupported. The evidence also justified the legal conclusion that there was such a reckless disregard of consequences on the part of the appellant as to imply an intention to assault plaintiff. The evidence supplies grounds for inferring

the constructive intent which makes a wrongful act willful. There is no reason why the appellant might not have passed without interfering with the person of any one, and his failure to do so implies the willingness to inflict an injury which in fact he did inflict. Mercer v. Corbin, 117 Ind. 450-453, 20 N. E. 132, 3 L. R. A. 221, 10 Am. St. Rep. 76; Peterson v. Haffner, 59 Ind. 130, 26 Am. Rep. 81. Appellant took hold of Trotter, and by force applied to him, and through him, communicated to the plaintiff, caused the plaintiff to be thrown and injured. In Peterson v. Haffner, supra, the medium or instrument by means of which the injury was inflicted was some mortar picked up and thrown. The character of the instrument used in committing an assault is immaterial, so far as the legal consequences thereof are concerned.

Battery—Drunkenness of Assailant.

REESE v. BARBEE.

61 Miss. 181. 1883.

CHALMERS, J. * * * The case has been tried the second time in the court below, and has resulted in a verdict of $976 for the plaintiff, from which the defendant appeals. The only assignment of error presented is to the action of the court below in instructing the jury that drunkenness of the defendant at the time of the commission of the assault was no defense against the action for damages, but was "an element aggravating said assault." The addition of the words, "an element aggravating said assault," it is insisted, was erroneous, since as the defendant would have been fully liable for his acts if sober, he could not be more so if drunk. * * * We have found no case adjudicating the point in a civil case except as to actions of slander, as to which the authorities differ, but we think the instruction was certainly correct under the facts of this case. Here a pregnant woman was advanced upon by a drunken man, pointing a drawn pistol at her and threatening to shoot. The terror into which she was thereby thrown was undoubtedly increased, and the disastrous consequences which thereupon ensued perhaps rendered more inevitable, by reason of the intoxicated condition of her assailant, since that condi-

tion of itself was well calculated to increase her terror. It was fitting, therefore, that the jury should be told that intoxication was an aggravation of the tort.

Battery—Intention on Part of Assailant.

BULLOCK v. BABCOCK.

3 Wendell 391 (N. Y.). 1829.

This was an action of trespass, assault, and battery.

[The defendant, who at the time of the accident was about twelve years of age, in shooting an arrow from a bow struck the plaintiff, a boy between nine and ten years old, and put out his eye. The boys were schoolmates, and there had been no quarrel between them. The defendant and another boy had been shooting at a mark. Some remark had been made by the plaintiff, and defendant had said, "I will shoot you." The plaintiff then ran into the schoolroom and hid behind a fire-screen. The defendant followed, and saying, "See me shoot that basket," discharged his arrow. There were a number of boys in the room. The basket was on a desk near the fire-screen. The plaintiff raised his head as the arrow was discharged and was hit in the eye. The sight of the eye that was struck was destroyed and the sight of the other impaired. The plaintiff brought this action within one year after attaining his majority.]

By the Court, MARCY, J. * * * The act of the defendant in shooting the arrow in the school-room, where there were a number of scholars, was not lawful; for, if the act in itself was lawful, and there was not a proper care to guard against consequences injurious to others, the actor must be held responsible for such consequences.

In ordinary cases, if the injury is not the effect of an unavoidable accident, the person by whom it is inflicted is liable to respond in damages to the sufferer. Where, in shooting at butts, the archer's arrow glanced and struck another, it was holden to be a trespass. Year-Book, 21 Hen. VII. fol. 28. So where a number of persons were lawfully exercising themselves at arms, one, whose gun accidentally went off, was held liable in trespass for the injury occasioned by the accident. Weaver v. Ward,

Hob. 134. * * * Where, in a dark night, the defendant got on the wrong side of the road, and an injury ensued to the person of the plaintiff, trespass for the damage was sustained. Leame v. Bray, 3 East, 593. It is decided in the case of Wakeman v. Robinson, 1 Bing. 213, if the accident happened entirely without the fault of the defendant, or any blame being imputable to him, an action will not lie. In that case, the blame imputable to the defendant was, that, his horse being young and spirited, he used him without a curb rein; that in his alarm he probably pulled the wrong rein; and that he ought to have continued in a straight course.

The blame fairly imputable to the defendant, it will be perceived, must have been slight indeed, as it certainly was in the case of the injury done by the glancing of the arrow when shooting at a mark (a lawful act), and by the accidental discharge of the musket at a training; and yet, in each of these cases, an action for the injury was maintained.

Unless a rule is to be applied to this case different from that applicable to a transaction between adults, the proof was most abundant to charge the defendant with the consequences of the injury.

Infants, in the same manner as adults, are liable for trespass, slander, assault, etc. * * * Where infants are the actors, that might probably be considered an unavoidable accident which would not be so considered where the actors are adults; but such a distinction, if it exists, does not apply to this case. The liability to answer in damages for trespass does not depend upon the mind or capacity of the actors; for idiots and lunatics, as we see by the case reported in Hobart, are responsible in the action of trespass for injuries inflicted by them.

Assault—Defendant Stops Before Striking Plaintiff.

STEPHENS v. MYERS.

4 C. & P. 349, 19 E. C. L. 548 (Eng.). 1830.

TINDAL, C. J., in his summing up, said: It is not every threat, when there is no actual personal violence, that constitutes an assault; there must, in all cases, be the means of carrying the

threat into effect. The question I shall leave to you will be, whether the defendant was advancing at the time, in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached the chairman if he had not been stopped; then, though he was not near enough at the time to have struck him, yet, if he was advancing with that intent, I think it amounts to an assault in law. If he was so advancing that, within a second or two of time, he would have reached the plaintiff, it seems to me it is an assault in law. If you think he was not advancing to strike the plaintiff, then only can you find your verdict for the defendant; otherwise you must find it for the plaintiff, and give him such damages as you think the nature of the case requires.

Assault—Threatening a Battery on an Unauthorized Condition.

UNITED STATES v. RICHARDSON.

5 Cranch C. C. 348, Fed. Cas. No. 16,155 (U. S.). 1837.

Indictment for an assault upon one Susan Shelton.

The evidence was that the defendant came into the house where Mrs. Shelton was sitting at a window. He was armed with a musket and a club; and raising the club over her head, in an attitude for striking, and within striking distance, said to her that if she said a word (or if she opened her mouth) he would strike her; and this without any provocation on her part.

Mr. Bradley and Mr. Hoban, for the defendant, contended that this was not, in law, an assault; that there can be no assault without a present intent to strike; and his saying, "if she opened her mouth," showed that he had not such a present intent; and they cited the old case, "if it were not the assizes, I would stab you."

But the COURT said that he had no right to restrain her from speaking; and his language showed an intent to strike upon her violation of a condition which he had no right to impose. Suppose a stranger comes to my house armed, and raises his club over my head, within striking distance, and threatens to beat me unless I will go out of and abandon my house; surely that would be an assault. So, if a highwayman puts a pistol to my breast, and threatens to shoot me unless I give him my money;

this would be evidence of an assault, and would be charged as such in the indictment.

Assault—Purpose to Assault Negatived.

TUBERVILLE v. SAVAGE.

1 Modern Reports 3 (Eng.). 1669.

Action of assault, battery, and wounding. The evidence to prove a provocation was, that the plaintiff put his hand upon his sword and said, "If it were not assize-time, I would not take such language from you." The question was, if that were an assault? The court agreed that it was not; for the declaration of the plaintiff was that he would not assault him, the judges being in town; and the intention as well as the act makes an assault.

Therefore, if one strike another upon the head or arm or breast in discourse, it is no assault, there being no intention to assault; but if one, intending to assault, strike at another and miss him, this is an assault; so if he hold up his hand against another in a threatening manner and say nothing, it is an assault.—In the principal case the plaintiff had judgment.

False Imprisonment—Essentials.

GOODELL v. TOWER.

77 Vt. 61, 58 Atl. 790. 1904.

TYLER, J. This action is trespass for false imprisonment. * * * It is contended in defendant Hastings' behalf that he did not restrain the plaintiff of his liberty. The trial court found that, having the complaint and warrant signed, respectively, by the other two defendants, he met the plaintiff, and stopped him by speaking to him as he was driving along on a business errand, read the paper to him, and told him he would have to go with him (Hastings); that the plaintiff told the officer that he would have to get some one to take his team; that the officer permitted him to do his errand, but directed him to return as soon as he could; that the plaintiff then drove

along; that Hastings became impatient, and went to meet him, turned in behind the plaintiff's team, and followed him to the village; that he went to the place of trial with the plaintiff, delivered the paper to the justice, and informed him that the plaintiff was present; that this was all that Hastings did besides making his return upon the warrant; that he understood that the plaintiff was in his custody.

The action of the officer constituted a false imprisonment. It was not necessary that he should lay his hands on him. It was sufficient that the plaintiff was within his power and submitted to the arrest. Mowry et al. v. Chase, 100 Mass. 79. Every restraint upon a man's liberty is, in the eye of the law, an imprisonment, wherever may be the place, or whatever may be the manner in which the restraint is effected. 2 Kent's Comm. 26. And see Pike v. Hanson, 9 N. H. 491, where it was held that words may constitute an imprisonment, if they impose a restraint upon a person, and he accordingly is restrained and submits. * * *

False Imprisonment—Restraint Induced by False Representation.

PAYSON v. MACOMBER.

3 Allen 69 (Mass.). 1861.

CHAPMAN, J. The third count is for abduction and false imprisonment. * * * The evidence tended to show that, by representations and threats of prosecution, and by paying her expenses, the defendant induced her [the plaintiff] to go to Salem and remain there for a while and that she became satisfied that he was deceiving her, and then returned and testified in the cause [from which defendant was trying to secure plaintiff's absence], which was a suit for divorce in favor of Mrs. Pulsifer against her husband. But it did not tend to show that the defendant used threats or force, and without this the plaintiff has no cause of action. It is at most a case where she yielded voluntarily to the defendant's misrepresentations and threats of a criminal prosecution against her, and absented herself from court and from her home for a time.

False Imprisonment—Consent of the Plaintiff.

WOOD v. CUMMINGS.

197 Mass. 80, 83 N. E. 318. 1908.

This was an action of tort in three counts: The first for assault and battery; second, for false imprisonment; and, third, for conversion of a lot of wood-working machinery. January 20, 1904, John F. Smith was adjudicated a bankrupt, and on February 29, 1904, defendant qualified as trustee of the estate. Plaintiff held a mortgage on Smith's goods and chattels of the date May 28, 1900, which also covered the engine hereinafter mentioned, and of which there was a breach of condition in payment of principal and interest at the time of bankruptcy. February 24, 1904, defendant took possession of the shop and contents as trustee, and locked the door, keeping the key. March 2, 1904, defendant and plaintiff entered the shop together; defendant having the door locked behind them. After checking the property, defendant, on demand of plaintiff, had the door unlocked so he could leave. Plaintiff testified that he sustained no injury or damage from such act of defendant. Later plaintiff got permission from Mrs. Smith, who owned the premises, to enter the shop, and, finding defendant's lock on the door, broke it off and entered in defendant's absence, declaring his intention to take possession and foreclose his mortgage. Defendant appeared and endeavored to eject plaintiff bodily, but failed, and left. Plaintiff then locked the door with a padlock of his own. Plaintiff testified that he sustained no injury or damage from this act of defendant. * * *

KNOWLTON, C. J. The plaintiff's claim of damages for false imprisonment is not sustained by the evidence. The testimony shows that the locking of the door was not to imprison the plaintiff, but for another purpose. As soon as the plaintiff made known his desire to go out, the door was unlocked, and the plaintiff suffered no injury nor damage. At the time of the alleged assault the plaintiff had entered the shop with the permission of the owner. The defendant, appearing later, objected, and said he would try to put the plaintiff out of the shop. "At once they wrestled with each other, and after some

time the defendant, not being able to put the plaintiff out, left the premises." Here was a use of force upon the person of the plaintiff, against his will and without justification in law. For this the plaintiff has a right of action, and may recover nominal damages. Com. v. Collberg, 119 Mass. 350, 20 Am. Rep. 328.

False Imprisonment—Shadowing by Detectives.

FOTHERINGHAM v. ADAMS EXPRESS COMPANY.

36 Fed. 252. 1888.

THAYER, J. With reference to the motion for a new trial which has been filed in this case and duly considered, it will suffice to say, that I entertain no doubt that the jury were warranted in finding that plaintiff was unlawfully restrained of his liberty from about the 27th or 28th of October until the 10th of November following; that is to say, for a period of about two weeks. The testimony in the case clearly showed that during that period he was constantly guarded by detectives employed by defendant for that purpose; that he was at no time free to come and go as he pleased; that his movements were at all times subject to the control and direction of those who had him in charge; that he was urged by them on several occasions to confess his guilt, and make known his confederates; and that he was subjected to repeated examinations and cross-examinations touching the robbery, of such a character as clearly to imply that he was regarded as a criminal, and that force would be used to detain him if he attempted to assert his liberty. The jury in all probability found (as they were warranted in doing) that during the time plaintiff remained in company with the detectives, he was in fact deprived of all real freedom of action, and that whatever consent he gave to such restraint was an enforced consent, and did not justify the detention without a warrant. It is manifest that the court ought not to disturb the finding on that issue.

CHAPTER II.

TRESPASS TO THE PERSON—PHYSICAL INJURY RESULTING FROM FRIGHT.

Damages Enhanced for Mental Anguish in Cases of Tort to the Person.

MELONE v. SIERRA RAILWAY COMPANY.

151 Cal. 113, 91 Pac. 522. 1907.

HENSHAW, J. Plaintiff was a passenger upon one of the defendant's trains, and was injured by a collision between his train and another, also belonging to defendant. He brought his action to recover damages for injuries inflicted, and the jury returned a verdict in his favor. Defendant appeals from the judgment and from the order refusing it a new trial. * * *

5. The court instructed the jury that an element of damage was "the pain and anxiety that he has suffered or may suffer by reason of his injuries." And, again, it instructed them that in estimating damages "you may take into consideration * * * the physical and mental suffering he may have sustained or may undergo in the future by reason of the injuries." It is argued that mental suffering is not an element of damage. In support of this proposition is cited Newman v. Smith, 77 Cal. 23, 18 Pac. 791, which was an action in fraud concerning real property, and the plaintiff sought a recovery for the worry, annoyance, and anxiety which the fraud had caused him. This court held that these were not elements of damage in such a case. Monroe v. Dredging Co., 84 Cal. 516, 24 Pac. 303, was an effort in an action by the personal representatives of the deceased to recover damages for the grief and mental suffering of the deceased's next of kin, and it was held that in such a case this was not a permissible element of damage. In Morgan v. Southern Pacific Co., 95 Cal. 510, 30 Pac. 603, an action by a mother to recover damages for the death of her child, the same effort

was made to recover for the sorrow and mental anguish of the parent, and it was held that in that case it was not an element of damage. But, on the contrary, where the suffering or mental anguish is endured by the victim it has been recognized as an element of damage since the cases of Malone v. Hawley, 46 Cal. 409. See Sloane v. Southern California Ry. Co., 111 Cal. 668, 44 Pac. 320.

Whether Damages Recoverable for Physical Injury Resulting From Fright.

MITCHELL v. ROCHESTER RAILWAY COMPANY.

151 N. Y. 107, 45 N. E. 354. 1896.

MARTIN, J. The facts in this case are few, and may be briefly stated. On the 1st day of April, 1891, the plaintiff was standing upon a crosswalk on Main street, in the city of Rochester, awaiting an opportunity to board one of the defendant's cars which had stopped upon the street at that place. While standing there, and just as she was about to step upon the car, a horse car of the defendant came down the street. As the team attached to the car drew near, it turned to the right, and came close to the plaintiff, so that she stood between the horses' heads when they were stopped. She testified that from fright and excitement caused by the approach and proximity of the team she became unconscious, and also that the result was a miscarriage, and consequent illness. Medical testimony was given to the effect that the mental shock which she then received was sufficient to produce that result.

Assuming that the evidence tended to show that the defendant's servant was negligent in the management of the car and horses, and that the plaintiff was free from contributory negligence, the single question presented is whether the plaintiff is entitled to recover for the defendant's negligence which occasioned her fright and alarm, and resulted in the injuries already mentioned. While the authorities are not harmonious upon this question, we think the most reliable and better-considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as

there was no immediate personal injury. * * * If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright, or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. Therefore the logical result of the respondent's concession would seem to be, not only that no recovery can be had for mere fright, but also that none can be had for injuries which are the direct consequences of it. If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and, if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy. Moreover, it cannot properly be said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual, and may, therefore, be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to proximate damages. The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and hence her damages were too remote to justify a recovery in this action. These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury.

GREEN v. SHOEMAKER & CO.

111 Md. 69, 73 Atl. 688. 1909.

Action by Rebecca A. Green against T. A. Shoemaker & Co. Judgment for defendant, and plaintiff appeals. Reversed, and new trial awarded.

Argued before BOYD, C. J., and PEARCE, BRISCOE, SCHMUCKER, BURKE, THOMAS, and WORTHINGTON, JJ.

The facts in this case were that the defendants were contractors engaged in extensive work on the Baltimore & Ohio Railroad, which required the blasting of large quantities of rock by the means of explosives near the residence of the plaintiff.

PEARCE, J. * * * The declaration contained four counts, and the first and second are substantially the same. They allege that at the time of the grievance complained of the plaintiff, as tenant, was in possession of three certain rooms in a house belonging to Mrs. Annie McIlvaney, in which said three rooms the plaintiff resided, and to the exclusive possession of which she was entitled; that the defendants from about April 14, 1906, to December, 1906, were engaged in blasting large quantities of rock near her said residence, and by means thereof caused large rocks and stones to be cast on the house in which she resided, and the lot of land appurtenant thereto, destroying doors, windows, sashes, and glass therein, breaking the roof and porches, and cracking the walls and ceilings of said house, and particularly of the three rooms occupied by the plaintiff, breaking the glass and china of the plaintiff and otherwise injuring her property, and wrongfully depriving her thus of the quiet and peaceable possession of said rooms as her dwelling.

The plaintiff testified that the first blast was on April 14, 1906; that it knocked nearly half the plastering from the wall of the room she was in, and part of the ceiling. None of it then fell on her, though some fell on Mrs. McIlvaney's child. It seemed to lift the house up, and then let it fall. It broke every glass in the windows except one. It threw the table upside down. It broke two dozen jars belonging to the plaintiff in the cellar of the house. On April 24th a stone burst through the roof and

ceiling and came down through plaintiff's bed, mattress, and spring, and broke the slats and rollers. It weighed twenty-two pounds. That blast tore the window sash out, broke some in two, and threw them across the room. They did not sleep in that bed for six weeks after that. This blasting kept up till the fall of 1906. They often had to leave their meals and run to the cellar, and were in terror all night of being killed. She had to sit up in a chair at night the best part of six weeks while they were blasting across the river. She said: "My nerves were completely broken down through fright, and I was not able to do my work. Before that time, I was in ordinary health, and never was nervous. Since then I have had no health at all. Dr. Miller attended me for this nervousness, and he came every day during the latter part of April, and after that every week or so until fall."

Dr. Miller testified that he was her family physician before and after this blasting; that after April 14th plaintiff developed nervous prostration which he attributed to the shock of the blasting. George Green, plaintiff's husband, testified that he worked for defendants at that time; that there was constant blasting going on, and that in consequence his wife had become a nervous wreck; that she was 30 years of age, and before this blasting had always attended to all her household duties, but since then has been unable to do so.

Upon the close of the plaintiff's testimony, the defendants moved to strike out all the evidence of the plaintiff's witnesses "bearing on the nervous condition and nervous shock to the plaintiff, and any physical injury resulting from such nervous shock, such testimony having been admitted subject to exception, because there is no evidence of any physical impact or corporal injury to the plaintiff." This motion was granted, and the first exception was taken to that ruling.

The defendants then prayed an instruction "that, under the pleadings and evidence in the case, there is no evidence legally sufficient to entitle the plaintiff to recover, and their verdict must be for the defendants"; and the second exception was taken to the granting of that instruction. The defendants having filed only the general issue plea to all the counts of the amended declaration, there is no question arising as to the form of the pleadings, and there are only two questions which it is necessary

to consider: (1) Can the plaintiff upon the evidence which was admitted recover damages for the interference with her quiet possession and enjoyment of the rooms occupied and rented by her? (2) Does a cause of action lie for physical injury resulting from fright and nervousness caused by the wrongful acts of the defendants?

* * * * * * * * *

This brings us to the important question involved in the granting of the motion to strike out all the testimony bearing on the nervous shock to the plaintiff and physical injury resulting therefrom. There is a wide divergence of judicial opinion as to whether a cause of action will lie for actual physical injuries resulting from fright and nervous shock caused by the wrongful acts of another, and it may be considered as settled that mere fright, without any physical injury resulting therefrom, cannot form the basis of a cause of action. This is so, because mere fright is easily simulated, and because there is no practical standard for measuring the suffering occasioned thereby, or of testing the truth of the claims of the person as to the results of the fright. But when it is shown that a material physical injury has resulted from fright caused by a wrongful act, and especially, as in this case, from a constant repetition of wrongful acts, in their nature calculated to cause constant alarm and terror, it is difficult, if not impossible, to perceive any sound reason for denying a right of action in law for such physical injury.

The grounds upon which those courts have proceeded which deny such right are twofold: "(1) That physical injury produced by mere fright caused by a wrongful act is not the proximate result of the act; and (2) that, upon the ground of expediency, the right should be denied because of the danger of opening the door to fictitious litigation, and the impossibility of estimating damages." Huston v. Freemansburg, 3 L. R. A. (N. S.) 50, Editor's note. As to the first of these grounds, this court has laid down in clear language the true doctrine upon this question in Balt. City Passenger Railway Co. v. Kemp, 61 Md. 80. In that case the court, speaking through Judge Alvey, said: "It is not simply because the relation of cause and effect may be somewhat involved in obscurity, and therefore difficult to trace, that the principle obtains that only the natural and

proximate results of a wrongful act are to be regarded. It is only where there may be a more direct and immediate sufficient cause of the effect complained of that the more remote cause will not be charged with the effect. If a given effect can be directly traced to a particular cause as the natural and proximate effect, why should not such effect be regarded by the law, even though such cause may not always, and under all conditions of things, produce like results? It is the common observation of all that the effects of personal physical injuries depend much upon the peculiar conditions and tendencies of the person injured, and what may produce but slight and comparatively uninjurious consequences in one case may produce consequences of the most serious and distressing character in another. * * * Hence the general rule is in actions of tort like the present that the wrongdoer is liable for all the direct injury resulting from his wrongful act, and that, too, although the extent or special nature of the resulting injury could not, with certainty, have been foreseen or contemplated as the probable result of the act done."

In the case now before us the evidence does not suggest any other cause of the effect complained of. It is a matter of common knowledge or observation that loud explosions, even if unattended by any immediate special dangers, are very trying to the nerves of those subjected to them. This is especially so when such explosions are constantly repeated, as in blasting, and are accompanied by the hurling about of rocks and stones displaced by the blast, to the danger of property, and life. It is equally a matter of common knowledge that as a general rule the nerves of women are more sensitive to injury than those of men, are more easily disturbed, and that, when so disturbed, the injurious consequences are more serious and lasting. Here is a young woman, 30 years of age, in sound health and free from any nervous disorder or tendency. She is subjected to a long continued series of terrific blastings near her dwelling, shattering the roof, walls, and windows by day and by night, and, in the language of the declaration, "putting her in continual fear and jeopardy of her life." In the absence of any evidence of any other cause, why, then, may not her nervous prostration be traced by the jury under the principles stated by Judge Alvey to the one cause shown to exist, viz., the alarm and terror

under which she was forced to live? In the case just cited there was a motion for a reargument based, as the court stated, upon authorities that were not brought to the attention of the court upon the former hearing, but the motion was overruled; the court saying: "Whether the direct causal connection exists is a question in all cases for the jury upon the facts in proof."

In Sloane v. Southern Cal. R. R., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193, a case similar to the present, in that there was no physical impact, the court said: "The real question presented by the objections and exception of the appellant is whether the subsequent nervous disturbance of the plaintiff was a suffering of the body or of the mind. * * * The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves or the entire nervous system are thus affected, there is a physical injury thereby produced; and, if the primal cause of this injury is tortious, it is immaterial whether it is direct as by a blow or indirect through some action upon the mind." If, in the case before us, the plaintiff had received an actual blow, however slight, either from a rock hurled by the blast, from the falling of a wall or ceiling, or even by a fall of herself, caused by the alarm of the concussions, no one would question her right to maintain this action, nor the right of the jury to consider the nervous prostration from which she is suffering in ascertaining the damages to be awarded. If, therefore, the jury had believed from the evidence which was stricken out that the nervous prostration of the plaintiff was the natural and proximate consequence of the alarm and terror to which she was subjected by the constant blasting, it would properly have formed an element for their consideration in reaching their verdict. For these reasons we do not think the question of proximate cause in this case justified the striking out of the testimony bearing upon the nervous shock and the resulting physical injury, nor in the withdrawal of the case from the jury.

We now come to the question of expediency. It appears from an examination of the cases in which the right of recovery has been denied where there has been no physical impact, that this doctrine has been the controlling one with the court. This is

especially apparent in the Pennsylvania and Massachusetts decisions. In Huston v. Freemansburger, 212 Pa. 548, 61 Atl. 1022, 3 L. R. A. (N. S.) 49, the court dealt only with that question, and said: "If we opened the door to this new invention, the result would be great danger, if not disaster, to the cause of practical justice." In Homans v. Boston Elevated R. W. Co., 180 Mass. 456, 62 N. E. 737, 57 L. R. A. 291, 91 Am. St. Rep. 324, Chief Justice Holmes said, referring to the rule established in that court: "As has been explained repeatedly, it is an arbitrary exception, based upon a notion of what is practicable, that prevents a recovery for visible illness resulting from nervous shock alone. * * * We must recognize the logic in favor of the plaintiff when a remedy is denied because the only immediate wrong is a shock to the nerves." At the trial below the defendant by various requests tried to press the principle so far as to require the plaintiff to prove that the nervous shock was the immediate consequence of a slight blow received by being thrown forward against a seat, whereas the judge allowed her to recover for the nervous shock ending in paralysis, if it resulted from a jar to her nervous system which accompanied the slight blow to her person. In other words, the court held that it was not necessary to show that the shock was the consequence of the blow; and Judge Holmes said: "We are of opinion the judge was correct, and that further refining would be wrong." This case well illustrates the difficulty felt by the court in denying a recovery upon the ground of expediency without withholding from the plaintiff a legal right. The argument from mere expediency cannot commend itself to a court of justice resulting in the denial of a logical legal right and remedy in all cases because in some a fictitious injury may be urged as a real one. The apparent strength of the theory of expediency lies in the fact that nervous disturbances and injuries are sometimes more imaginary than real, and are sometimes feigned, but this reasoning loses sight of the equally obvious fact that a nervous injury arising from actual physical impact is as likely to be imagined as one resulting from fright without physical impact, and that the former is as capable of simulation as the latter.

It must be conceded that the numerical weight of authority supports the general rule that there can be no recovery for

nervous affections unaccompanied by contemporaneous physical injury, but the sounder view in our opinion is that there are exceptions to this rule, and that where the wrongful act complained of is the proximate cause of the injury within the principles announced in Kemp's Case, supra, and where the injury ought in the light of all the circumstances to have been contemplated as a natural and probable consequence thereof, the case falls within the exception and should be left to the jury. In England in Victorian Railway Commissioners v. Coultas, L. R. 13 App. Cases, 222, the court held that damages arising from mere terror unaccompanied at the time by any physical injury could not be considered as a consequence of the wrongful act there complained of, although the court refused to decide that in no case could recovery be had without proof of actual impact. In Bell v. Great Northern R. R. Co., 26 L. R. Irish, 428, the court refused to follow the case just mentioned, saying that where no intervening independent cause of the injury was suggested, and where the jury could find that the bodily injury complained of was a natural consequence of the fright, the chain of reasoning for recovery was complete. These cases are reviewed in 1 Beven on Negligence (2d Ed.), pp. 76-83, and the doctrine of the former is criticised with much force and discrimination. In Watkins v. Kaolin Manufacturing Co., 131 N. C. 536, 42 S. E. 983, 60 L. R. A. 617, the action was brought to recover damages for injury to the nerves resulting from blasting near the plaintiff's dwelling, though there was no external physical impact. It was held that an allegation that plaintiff became so nervous and frightened from the negligent and reckless blasting by the defendant that she could not sleep at night, and was greatly disturbed in body and mind, stated a good cause of action for physical injury; and it was held that an action will lie for physical injury or disease resulting from fright or nervous shocks caused by negligent acts.

In Denver R. R. v. Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77, the jury was instructed as follows: "If great fright was a reasonable and natural consequence of the circumstances in which the collision aforesaid, with the ensuing wreckage, explosion, and conflagration, placed the plaintiff, and if she was actually put in fright by those circumstances, and injury to her health was a reasonable and natural consequence

of such fright and was actually and proximately occasioned thereby, then said injury is one for which damages are recoverable." The reasoning upon which that conclusion was reached is in our opinion sound, and it is in accord with the views expressed in Sedgwick on Damages (8th Ed.), § 861; Addison on Torts, 5; 3 Sutherland on Damages, 714, 715. The same view was held in Tuttle v. Atlantic City Railway Co., 66 N. J. Law, 327, 49 Atl. 450, 54 L. R. A. 582, 88 Am. St. Rep. 491, in Watson v. Dilts, 116 Iowa, 249, 89 N. W. 1068, 57 L. R. A. 559, 93 Am. St. Rep. 239, in Mack v. South Bound R. R., 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913, in Purcell v. St. Paul City R. W. Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203, in Gulf, Col. & Santa Fe R. W. Co. v. Hayter, 93 Tex. 239, 54 S. W. 944, 47 L. R. A. 325, 77 Am. St. Rep. 856, and in Consolidated Traction Co. v. Lambertson, 59 N. J. Law, 297, 36 Atl. 100.

It may be observed here that there is a class of cases in which courts which generally sustain the contrary rule seem not to require contemporaneous physical injury in order to sustain a recovery for fright and its consequences. In Spade v. Lynn R. R., 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393, where a recovery was denied, the court said: "We do not include cases of acts done with gross carelessness or recklessness showing utter indifference to such consequences when they must have been in the actor's mind." In Nelson v. Crawford, 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577, it is intimated that the rule does not reach those cases where there is an intention to cause mental distress, and in Wilkinson v. Downton, (1897) 2 Q. B. 57, it was expressly so held where a practical joke resulted in fright producing a miscarriage. In the case before us the evidence is that the defendants were notified of the injury to the house, and they made some repairs, but that the blasting continued thereafter and during all the summer with the same results. This would seem to come fairly within the description of gross recklessness as to consequences, and thus to bring the case within that exception.

In view of all the circumstances of this case, we cannot apply to it the rigid rule applied in some courts, requiring actual contemporaneous physical impact producing physical injury, and we are of opinion that the case should have gone to the jury

upon the principles announced in Denver R. R. v. Roller, supra. It will be for the court in future cases of this character, as in all other cases where the questions of proximate cause and legally sufficient evidence arise, to permit no recovery except upon the application of the principles just mentioned, while denying none upon the ground of mere expediency, where these principles logically require the submission of the case to the jury.

Judgment reversed, with costs to the appellant above and below, and new trial awarded.

CHAPTER III.

TRESPASS TO PROPERTY.

Trespass to Real Property—Inadvertence.

BASELY v. CLARKSON.

3 Levinz 37 (Eng.). 1681.

Trespass for breaking his close, called the balk and hade, and cutting his grass, and carrying it away. The defendant disclaims any title in the lands of the plaintiff, but says that he hath a balk and hade adjoining to the balk and hade of the plaintiff, and in mowing his own land he involuntarily and by mistake mowed down some grass growing upon the balk and hade of the plaintiff, intending only to mow the grass upon his own balk and hade, and carried the grass, &c., quæ est eadem, &c. Et quod ante emanationem brevis he tendered to the plaintiff 2s. in satisfaction, and that 2s. was sufficient amends. Upon this the plaintiff demurred, and had judgment; for it appears that the fact was voluntary, and his intention and knowledge are not traversable; they cannot be known.

Trespass to Real Property—Nominal Damage.

PFEIFFER v. GROSSMAN.

15 Ill. 53. 1853.

TREAT, C. J. This was an action of trespass quare clausum fregit, brought in 1853, by Pfeiffer against Grossman. The plea was not guilty. It appeared in evidence that the plaintiff had title to a certain tract of land; that according to a survey made in 1854 [sic] a fence claimed by the defendant was on this tract. The fence inclosed about half an acre of the tract, part of which was in timber and the rest in cultivation. The fence was built by McGuire, who was in possession previous to the

defendant. Prior to the survey there was some difficulty between the plaintiff and defendant as to the boundary line, the latter claiming to the fence. The defendant was dissatisfied with the survey, and continued in possession of the ground up to the fence, although notified by the plaintiff to remove the fence. After the suit was brought the defendant caused another survey to be made, which agreed with that made in 1851. It was stated by the plaintiff's counsel that the suit was brought for the purpose of establishing the boundary line between the parties. The court refused to give these instructions: "That the putting a fence or letting it stay on the land of another is a trespass in the eye of the law, for which the aggrieved person is entitled to at least nominal damages; that the ploughing up of another man's land and cultivating it, although the land may thereby be improved, is still a trespass in law, for which the person aggrieved is entitled to at least nominal damages." The jury found the issue for the defendant, and the court rendered judgment on the verdict.

The instructions not only asserted correct legal principles, but they were strictly applicable to the case. If a party puts a fence on another's land or ploughs up the soil, he is liable as a trespasser. Such acts are a violation of the owner's right of possession, to redress which the law gives him an action. And the action is maintainable, although the owner is not substantially injured. He is entitled to nominal damages for the intrusion upon his possession. The defendant cannot defeat the action by showing that the plaintiff is not materially prejudiced, or even that he is actually benefited. * * * Especially is this the case where the suit is brought for the purpose of settling a question of right. * * *

The judgment is reversed and the cause remanded.

Trespass to Real Property—Consent of Defendant.

SMITH v. STONE.

Style 65. 1647.

Smith brought an action of trespass against Stone pedibus ambulando. The defendant pleads this special plea in justifica-

tion, viz., that he was carried upon the land of the plaintiff by force and violence of others, and he was not there voluntarily, which is the same trespass for which the plaintiff brings his action. The plaintiff demurs to this plea. In this case, ROLL, J., said, that it is the trespass of the party that carried the defendant upon the land, and not the trespass of the defendant: as he that drives my cattle into another man's land is the trespasser against him, and not I, who am owner of the cattle.

Trespass to Real Property—Superjacent Space.

SMITH v. SMITH.

110 Mass. 302. 1872.

MORTON, J. This is an action of tort in the nature of trespass quare clausum fregit. The plaintiff in his declaration, among other acts of trespass, alleges that the defendant built a part of his barn upon the plaintiff's close, and thereby put and kept the plaintiff out of the possession and occupation of a part of the close. We think it was competent for the plaintiff to prove that the eaves of the defendant's barn projected over the plaintiff's close. Projecting his eaves over the plaintiff's land is a wrongful act on the part of the defendant, which, if continued for twenty years, might give him a title to the land by adverse occupation. It is a wrongful occupation of the plaintiff's land for which he may maintain an action of trespass. * * *

We are of opinion that the instruction to the jury, that if the defendant's barn "came over on to the plaintiff's land no more than a fence of ordinary width" would, it would not be a trespass, was erroneous. It was not erected as a fence, and was not a fence. A man who erects a barn or other building partly upon the land of another, without any agreement that the wall shall be a division wall or fence, cannot defend an action of trespass by showing that it covered no more of the plaintiff's land than a fence would. Such an occupation is, in its nature and legal effect, entirely different from the occupation by a fence. It is an adverse occupation, which, if continued for twenty years, will give a title to the soil by prescription.

BUTLER v. FRONTIER TELEPHONE COMPANY.

186 N. Y. 486, 79 N. E. 716. 1906.

VANN, J. The question presented by this appeal is whether ejectment will lie when the soil is not touched, but part of the space a few feet above the soil is occupied by a telephone wire unlawfully strung by the defendant across the plaintiff's premises. This question has never been passed upon by the Court of Appeals, nor by the Supreme Court, except in the decision now before us for review. Questions similar, but not identical, as they related to overhanging eaves, projecting cornices, or leaning walls, were decided in favor of the defendant in Aiken v. Benedict, 39 Barb. 400, and Vrooman v. Jackson, 6 Hun 326, and in favor of the plaintiff in Sherry v. Frecking, 4 Duer 452. * * *

The precise question before us does not appear to have been passed upon in any other state, and upon the cognate question relating to projecting cornices and the like the authorities are divided. Some hold that ejectment will lie because there is an actual ouster or disseisin. Murphy v. Bolger, 60 Vt. 723, 15 Atl. 365, 1 L. R. A. 309; McCourt v. Eckstein, 22 Wis. 153, 94 Am. Dec. 594; Stedman v. Smith, 92 Eng. C. L. 1. Others hold that there is not such a disturbance of possession as to sustain an action in that form. Norwalk H. & L. Co. v. Vernon, 75 Conn. 662, 55 Atl. 168, 96 Am. St. Rep. 246; Rasch v. Noth, 99 Wis. 285, 74 N. W. 820, 40 L. R. A. 577, 67 Am. St. Rep. 858.

The case last cited does not overrule the earlier case in Wisconsin, but proceeds upon the theory that the aerial space was occupied by the projecting eaves of both parties, one above the other, on opposite sides of the boundary line. Some of the cases hold that a court of equity may order the removal of a projection without deciding whether ejectment will lie or not. Thus, in Wilmarth v. Woodcock, 58 Mich. 482, 485, 25 N. W. 475, it was decided that equity would require the removal of a projecting cornice, because "no remedy at law is adequate, owing to the uncertainty of the measure of damages, to afford complete compensation." But, as the learned court continued: "No person can be permitted to reach out and appropriate the

property of another, and secure to himself the adverse enjoyment and use thereof, which, in a few years, will ripen into an absolute ownership by adverse possession." See, also, Plummer v. Gloversville Electric Co., 20 App. Div. 527, 47 N. Y. Supp. 228.

While some of the cases may be harmonized by resort to the distinction between "disseisins in spite of the owner and disseisins at his election," the main question is open, and must be determined upon principle. The defendant concedes that the plaintiff has a remedy, but insists that it is an action for trespass, or to abate a nuisance, while the plaintiff claims that ejectment is a proper remedy and one of especial value, as it entitles him, if he needs it, to a second trial as a matter of right and to costs, even if he recovers less than $50 damages. Code Civ. Proc., §§ 1525, 3228.

* * * * * * * * *

What is "real property"? What does the term include so far as the action of ejectment is concerned? The answer to these questions is found in the ancient principle of law: "Cujus est solum, ejus est usque ad cœlum et ad inferos." The surface of the ground is a guide, but not the full measure; for within reasonable limitations land includes not only the surface but also the space above and the part beneath. Co. Litt. 4a; 2 Blackstone's Comm. 18; 3 Kent's Comm. (14th Ed.), *401. "Usque ad cœlum" is the upper boundary, and, while this may not be taken too literally, there is no limitation within the bounds of any structure yet erected by man. So far as the case before us is concerned, the plaintiff as the owner of the soil owned upward to an indefinite extent. He owned the space occupied by the wire, and had the right to the exclusive possession of that space, which was not personal property, but a part of his land. According to fundamental principles and within the limitation mentioned, space above land is real estate the same as the land itself. The law regards the empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly. If the wire had touched the surface of the land in permanent and exclusive occupation, it is conceded that the plaintiff would have been dispossessed pro tanto. A part of his premises would not have been in his possession, but in the possession of another. The extent of the disseisin, however,

does not control; for an owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath. If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space only would be occupied. Erect a house upon the bridge, and the air above the surface of the land would alone be disturbed. Where along the line of these illustrations would dispossession begin? What rule has the law to measure it by? How much of the space above the plaintiff's land must be subjected to the dominion of the defendant in order to effect a dispossession? To what extent may the owner be dispossessed and kept out of his own before there is a privation of seisin? Unless the principle of "usque ad cœlum" is abandoned, any physical, exclusive, and permanent occupation of space above land is an occupation of the land itself and a disseisin of the owner to that extent.

HANNABALSON v. SESSIONS.

116 Iowa 457, 90 N. W. 93. 1902.

Action at law to recover damages for an alleged assault and battery. There was a verdict and judgment for defendant, and plaintiff appeals. Affirmed.

WEAVER, J. Plaintiff and defendant live upon adjoining lots. There is frequent war between the families. The casus belli in the present instance is to be found in the following circumstances: Upon the boundary line between the lots is a tight board fence, a part of which was built by plaintiff's husband; but, unfortunately, this barrier, while all-sufficient to prevent the passage of the dove of peace, is neither high enough nor tight enough to prevent the interchange of brickbats or the bandying of opprobrious epithets. On May 30, 1898, the defendant, while at work in his garden, claimed to have narrowly escaped a brick hurled in his direction by one of plaintiff's children, and in his indignation at the unprovoked bombardment

threatened the lad with arrest. Plaintiff and her husband, being at work nearby, heard the threat, and took up the quarrel. About this time plaintiff's husband discovered that a ladder belonging to defendant was hanging upon a peg or block attached to the partition fence, and, conceiving this to be a cloud upon his title, he forthwith attempted to remove it, while defendant, seeing the peril in which his property was placed, rushed to its defense. Whether plaintiff herself laid violent hands on the ladder is a matter of grave dispute. She denies it, and says that the height and depth of her offending consisted in her leaning up against the fence with one arm quietly hanging over the top thereof, and in stimulating her husband's zeal by audible remarks about the "crazy fool" who was bearing down upon them from the other side. She further avers that while occupying this position of strict neutrality the defendant assaulted her vi et armis, and with his clenched fist struck the arm which protruded over the fence top into his domain.

Defendant denies the striking, and says that plaintiff, instead of being a peaceable and impartial observer of the skirmish, was herself a principal actor, and that in aid of her husband she climbed upon some convenient pedestal, and, hanging herself across the fence, reached down, and with malice aforethought seized the ladder and wrenched it from its resting place. Thereupon, actuated by a natural and lawful desire to protect his property from such ravishments, and being goaded on by statements from the other side of the fence reflecting upon his mother and casting doubt upon his proper rank in the animal kingdom, he gently, and without unreasonable force, laid his open hand upon plaintiff's arm, and mildly but firmly suggested the propriety of her "keeping on her own side of the fence."

* * * * * * * * *

It is also said that the court erred in instructing the jury that, if plaintiff leaned over the partition fence and attempted to interfere with the ladder, defendant had the right to use such force upon her as was reasonably necessary to cause her to desist, and to expel her from his premises. * * *

The general doctrine announced in the instruction is, in our judgment, correct. The mere fact that plaintiff did not step

across the boundary line does not make her any less a trespasser if she reached her arm across the line, as she admits she did. It is one of the oldest rules of property known to the law that the title of the owner of the soil extends, not only downward to the center of the earth, but upward usque ad cœlum, although it is, perhaps, doubtful whether owners as quarrelsome as the parties in this case will ever enjoy the usufruct of their property in the latter direction. The maxim, "Ubi pars est ibi est totum,"—that where the greater part is there is the whole,—does not apply to the person of a trespasser, and the court and jury could therefore not be expected to enter into any inquiry as to the side of the boundary line upon which plaintiff preponderated, as she reached over the fence top. It was enough that she thrust her hand or arm across the boundary to technically authorize the defendant to demand that she cease the intrusion, and to justify him in using reasonable and necessary force required for the expulsion of so much of her person as he found upon his side of the line, being careful to keep within the limits of the rule, "Molliter manus imposuit," so far as was consistent with his own safety. Under the instruction of the court, the jury must have found that defendant kept within the scope of his legal rights in this respect, and that the alleged assault was not established by the evidence.

Trespass to Personal Property.

WINTRINGHAM v. LAFOY.

7 Cowen 735 (N. Y.). 1827.

SAVAGE, C. J. * * * Was there any evidence of a trespass? If a sheriff take the goods of a stranger, he is liable in this action. It is contended, however, that admitting the goods to belong to the plaintiff, the defendant did no tortious act. Every unlawful interference by one person with the property of another is a trespass. The defendant in the court below undertook to control the property levied on. He took it into his possession, though there was no manual seizing of it. He was about to take it away, and would have done so but for the security given him that it should be forthcoming upon the execution. He exercised dominion over it. This was enough to

constitute him a trespasser, he having no authority. Trover lies against a defendant, who undertakes to control property in defiance or exclusion of the owner. The same doctrine is applicable in trespass as in trover, where the conversion is the tortious intermeddling with the goods of another.

MILLER v. BAKER.

1 Met. 27 (Mass.). 1840.

Trespass against the sheriff of Norfolk for taking, by one of his deputies, nursery trees, shrubs, and plants, and converting them to his own use.

DEWEY, J. That trespass de bonis asportatis is a proper form of action where the owner of personal chattels seeks to recover against the sheriff damages for the illegal act of his deputy, in taking such chattels under color of process of law and by virtue of his office, is too well settled to admit of question. * * *

Nor is there any doubt that the acts done by the servant of the defendant would constitute a trespass, as to the personal chattels of the plaintiff. A forcible taking of goods is not necessary to enable the owner to maintain trespass. On a similar question in Gibbs v. Chase, 10 Mass. 128, Sewall, J., says: "No actual force is necessary to be proved. He who interferes with my goods, and without delivery by me, and without my consent, undertakes to dispose of them as having the property, general or special, does it at his peril to answer me the value in trespass or trover." It is sufficient to maintain trespass, if the party exercises an authority over the goods against the will and to the exclusion of the owner by an unlawful intermeddling, though there be no manual taking or removal. Wintringham v. Lafoy, 7 Cow. 735; Phillips v. Hall, 8 Wend. 610.

In the present case there was not only an attachment of the property, but the placing of a keeper over it with directions to permit no one to remove the same, and an entry and exclusive possession by the keeper. It seems, therefore, that as to so much of the property in controversy as is conceded to be personal chattels, the case is clearly with the plaintiff.

CHAPTER IV.

EXCUSABLE TRESPASSES—ACCIDENT—MISTAKE—LEAVE AND LICENSE.

Accident.

BROWN v. KENDALL.

6 Cush. 292 (Mass.). 1850.

This was an action of trespass for assault and battery, originally commenced against George K. Kendall, the defendant, who died pending the suit, and his executrix was summoned in. It appeared in evidence, on the trial, which was before WELLS, C. J., in the Court of Common Pleas, that two dogs, belonging to the plaintiff and the defendant, respectively, were fighting in the presence of their masters; that the defendant took a stick about four feet long and commenced beating the dogs in order to separate them; that the plaintiff was looking on, at a distance of about a rod, and that he advanced a step or two towards the dogs. In their struggle the dogs approached the place where the plaintiff was standing. The defendant retreated backwards from before the dogs, striking them as he retreated; and as he approached the plaintiff, with his back towards him, in raising his stick over his shoulder in order to strike the dogs, he accidentally hit the plaintiff in the eye, inflicting upon him a severe injury. * * *

The defendant requested the judge to instruct the jury, that "if both plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care and the plaintiff was not, or if at that time both plaintiff and defendant were not using ordinary care, then the plaintiff could not recover." * * * The judge declined to give the instructions, as above requested, but left the case to the jury under the following instructions: "If the defendant, in beating the dogs, was doing a necessary act, or one which it was his duty under the circumstances of the case to do, and

was doing it in a proper way, then he was not responsible in this action, provided he was using ordinary care at the time of the blow. If it was not a necessary act; if he was not in duty bound to attempt to part the dogs, but might with propriety interfere or not as he chose, the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word inevitable not in a strict but in a popular sense." * * *

The jury under these instructions returned a verdict for the plaintiff; whereupon the defendant alleged exceptions. * * *

SHAW, C. J. This is an action of trespass, vi et armis, brought by George Brown against George K. Kendall, for an assault and battery, and the original defendant having died pending the action, his executrix has been summoned. * * * The facts set forth in the bill of exceptions preclude the supposition that the blow, inflicted by the hand of the defendant upon the person of the plaintiff, was intentional. The whole case proceeds on the assumption, that the damage sustained by the plaintiff, from the stick held by the defendant, was inadvertent and unintentional; and the case involves the question how far, and under what qualifications, the party by whose unconscious act the damage was done is responsible for it. We use the term "unintentional" rather than involuntary, because in some of the cases it is stated that the act of holding and using a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a voluntary act, although its particular effect in hitting and hurting another is not within the purpose or intention of the party doing the act.

It appears to us, that some of the confusion in the cases on this subject has grown out of the long-vexed question, under the rule of the common law, whether a party's remedy, where he has one, should be sought in an action of the case, or of trespass. This is very distinguishable from the question, whether in a given case any action will lie. The result of these cases is, that if the damage complained of is the immediate effect of the act of the defendant, trespass vi et armis lies; if consequential only, and not immediate, case is the proper remedy. Leame v. Bray, 3 East 593; Hugget v. Montgomery, 2 N. R. 446. In

these discussions it is frequently stated by judges, that when one receives injuries from the direct act of another, trespass will lie. But we think this is said in reference to the question, whether trespass and not case will lie, assuming that the facts are such that some action will lie. These dicta are no authority, we think, for holding that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither wilful, intentional, nor careless. * * *

We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either the *intention* was unlawful, or that the defendant was *in fault;* for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. Wakeman v. Robinson, 1 Bing. 213. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. Davis v. Saunders, 2 Chitty 639; Vincent v. Stinehour, 7 Vt. 69. In applying these rules to the present case we can perceive no reason why the instructions asked for by the defendant ought not to have been given; to this effect, that if both plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care, and the plaintiff was not, or if at that time both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover.

In using this term, ordinary care, it may be proper to state, that what constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. A man who should have occasion to discharge a gun on an open and extensive marsh, or in a forest, would be required to use less circumspection and care than if he were to do the same thing in an inhabited town, village, or city. To make an accident, or casualty, or, as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed. * * *

We can have no doubt that the act of the defendant in attempting to part the fighting dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a lawful and proper act, which he might do by proper and safe means. If, then, in doing this act, using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he accidentally hit the plaintiff in the eye, and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie.

The court are of opinion that [the directions of the court below] were not conformable to law. If the act of hitting the plaintiff was unintentional, on the part of the defendant, and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise of due care, adapted to the exigency of the case, and therefore such want of due care became part of plaintiff's case, and the burden of proof was on the plaintiff to establish it. * * *

Mistake.

HOBART v. HAGGET.

12 Maine 67. 1835.

Trespass for the alleged taking and converting to his own use by the defendant of an ox, the property of the plaintiff. The general issue was pleaded and joined. The defendant proved that he met the plaintiff in the street and paid him $25.50 for an ox, which the plaintiff directed him to go and take. That he went and took an ox out of the plaintiff's inclosure, supposing it to be the one he had so purchased. * * *

PARRIS, J. * * * The jury having found for the plaintiff have virtually found that he did not sell the ox in controversy, and the question is raised whether the defendant is liable in trespass for having taken it by mistake.

It is contended that where the act complained of is involuntary, and without fault, trespass will not lie, and sundry authorities have been referred to in support of that position. But the act complained of in this case was not involuntary. The

taking the plaintiff's ox was the deliberate and voluntary act of the defendant. He might not have intended to commit a trespass in so doing. Neither does the officer, when on a precept against A, he takes by mistake the property of B, intend to commit a trespass; nor does he intend to become a trespasser, who, believing that he is cutting timber on his own land, by mistaking the line of division cuts on his neighbor's land; and yet, in both cases, the law holds them as trespassers.

The case of Higginson v. York, 5 Mass. 341, was still stronger than either of those above supposed. In that case one Kenniston hired the defendant to take a cargo of wood from Burntcoat Island to Boston. Kenniston went with the defendant to the island, where the latter took the wood on board the vessel and transported it to Boston, and accounted for it to Kenniston. It turned out on trial that Phinney had cut this wood on the plaintiff's land without right or authority, and sold it to Kenniston. York, the defendant, was held liable to the plaintiff for the value of the wood in an action of trespass, although it was argued that he was ignorant of the original trespass committed by Phinney. A mistake will not excuse a trespass. * * *

MAYE v. YAPPEN.

23 Cal. 306. 1863.

CROCKER, J., delivered the opinion of the Court; COPE, C. J., and NORTON, J., concurring.

This is an action to recover damages, in the sum of $2,000, which the plaintiffs allege they sustained, by reason of the acts of the defendants, in entering upon the mining claim of the plaintiffs, and taking away gold and gold-bearing earth of that value. The case was tried by a jury, who found for the plaintiffs damages in the sum of fifty dollars, for which amount judgment was rendered, and the plaintiffs appeal therefrom, and from an order refusing a new trial.

* * * * * * * * *

It appears that the plaintiffs and defendants were the owners of adjoining mining claims, which were worked by deep underground tunnels. The fact that the defendants mined over the

dividing line between the claims, and worked out a portion of the mining ground of the plaintiffs, is not disputed; but they contend that it was not done wilfully or intentionally, but in ignorance of the locality of the dividing line, between the claims, under the surface; and that they were led to work over the line, by the representations of one of the plaintiffs, as to its locality, in relation to the tunnel and the place they were working. On the trial the plaintiffs objected to all evidence showing that the defendants were ignorant of the location of this dividing line; but the court overruled the objection, and permitted several of the defendants to testify to those facts, and this is assigned as error. The plaintiffs, in this action, were not entitled to vindictive or exemplary damages, but could only recover the damages they had actually sustained by being deprived of the gold or gold-bearing earth taken by the defendants from their mining ground. It follows that the question whether the defendants acted wilfully and maliciously, or ignorantly and innocently, in digging up and taking away the gold-bearing earth, is entirely immaterial. The defendants took property belonging to the plaintiffs, and have thereby injured them to a certain amount; and that amount is made no greater nor less by the fact that the act was done without any malicious intent. The right of the plaintiffs to recover damages, or the amount of the damages to which they may be entitled, is not affected by the fact that the trespass was not wilful in its character. The ruling of the court upon this question was therefore erroneous.

Leave and License.

McNEIL v. MULLIN.

70 Kan. 634, 79 Pac. 168. 1905.

BURCH, J. The plaintiff sued the defendant for damages resulting from injuries inflicted in a fight. The petition was in the ordinary form for an assault and battery, involving a mayhem. The answer pleaded justification. The evidence given at the trial indicates that insulting words were followed by a mutual stripping of hats and coats, a movement of the defendant toward the plaintiff in an angry manner, mutual challenges

of each to whip the other, a statement by the defendant that it would not cost the plaintiff a penny to whip him, a reply by the defendant that he was no more afraid of a dollar than the plaintiff, much vile talk, and then a voluntary separation. Immediately afterward, as the parties were going in the same direction along a public street, the quarrel was renewed. The defendant stopped, alighted from his buggy, tied his horse by the roadside, and removed his hat and coat. The plaintiff stopped his team, left his buggy, and removed his hat and coat. The plaintiff says the defendant approached him in a threatening attitude, and that as soon as they were near enough they clinched and fell. Other testimony is to the effect that they clinched before any blow was struck. The defendant says the plaintiff struck him as soon as he could be reached, thereby delivering the technical "first blow" of the altercation, and his testimony is corroborated in this respect. The succeeding conduct of the parties was characterized by perfect freedom from all hampering conventionalities. * * *

Under the evidence the jury had the right to believe that each party voluntarily undertook to subdue the other by violence, taking the chances of receiving punishment himself; that they mutually consented to a physical combat, with the mutual purpose of doing each other hurt and the mutual expectation of encountering force in return; and that all injuries inflicted in the course of the contest were the product of this vicious animus of each participant toward his adversary. Such being the nature of the proof, it was consistent with the allegations of the plaintiff's petition in every particular. There was an assault, a beating, a wounding, and a maiming, unlawful, malicious, and without just cause or provocation, precisely as alleged. The plaintiff could not have made allegations more appropriate to the nature of his case than those contained in his petition. He could have pleaded nothing to which the proof would have corresponded better. No further or broader allegations were necessary in order to include the facts disclosed by the evidence, and the plea of justification contained in the answer could not limit the scope of the petition, or impose the defendant's theory of the case upon the plaintiff. * * *

If the parties fought by mutual consent, the circumstance of who committed the first act of violence was immaterial; and,

so long as each combatant persisted in his original determination to vanquish his antagonist, the aggressions were mutual. A resistance which has for its real object the securing of an opportunity to mangle the assailant is not legal self-defense; and while it seems to be the law that, in a proper case, the jury may be required to follow the kaleidoscopic fortunes of a rough and tumble fight, and determine whether at a given moment of time a finger was bitten off or an eye was gouged as a matter of self-protection, rather than of attack (see Gutzman v. Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744), they are not obliged to take the striking of the first blow as the point of departure in a case of mutual combat.

Consent to engage in mutual combat may be inferred from circumstances. Conduct may have much more weight than profanity in determining the actual attitude of the parties toward each other, and the rules for ascertaining the true state of mind of brawlers who finally come to blows are not different from those applied in other cases.

If the encounter were the result of reciprocal desires to fight, the combat of each party was criminal. Each one was punishable at least for a breach of the peace and for an assault and battery. * * * Because it was a criminal enterprise his consent to participate in the mêlée does not deprive either party of his civil remedy against the other, and each one is entitled to recover from the other all damages resulting from the injuries he received in the fight. Chief Justice Cooley, in his work on Torts, states the law on this subject as follows:

"Consent is generally a full and perfect shield, when that is complained of as a civil injury which was consented to. A man cannot complain of a nuisance the erection of which he concurred in or countenanced. He is not injured by a negligence which is partly chargeable to his own fault. A man may not even complain of the adultery of his wife, which he connived at or consented to. If he concurs in the dishonor of his bed, the law will not give him redress, because he is not wronged. These cases are plain enough, because they are cases in which the questions arise between the parties alone. But in case of a breach of the peace it is different. The State is wronged by this, and forbids it on public grounds. If one is injured, the law will not listen to an excuse based on a breach of the law. There are three

parties here; one being the State, which, for its own good, does not suffer the others to deal on a basis of contract with the public peace. The rule of law is therefore clear and unquestionable that consent to an assault is no justification. The exception to this general rule embraces only those cases in which that to which assent is given is matter of indifference to public order, such as slight batteries in play or lawful games—such unimportant injuries as, even when they constitute technical wrongs, may well be overlooked and excused by the party injured, if not done of deliberate malice. But an injury, even in sport, would be an assault if it went beyond what was admissible in sports of the sort, and was intentional."

Sir Frederick Pollock concurs fully in these views (Pollock on Torts [8th ed., p. 161]); and the consensus of judicial opinion both in England and in the United States is, with but slight demur, to the same effect. * * *

There is some natural repugnancy to allowing damages to be recovered by a bullying blackguard who has courted a fight and has been soundly thrashed, but the law can indulge in no sentiment regarding the matter. It can concede no legal effect to his vicious purpose. His consent to fight must be treated as utterly void, and each party must be left to suffer all consequences, civil and criminal, of his reprehensible conduct.

Although the evidence fully warranted that it should be done, the jury were not allowed to apply the foregoing principles to the case under consideration. Therefore the judgment of the District Court is reversed, and the cause is remanded for a new trial. All the justices concurring.

CHAPTER V.

EXCUSABLE TRESPASSES—DEFENSE OF SELF, OF THIRD PERSONS, AND OF PROPERTY—RECAPTION OF PROPERTY.

Self-Defense.

COCKCROFT v. SMITH.

2 Salk. 642 (Eng.). 1706.

In trespass for an assault, battery, and maihem, defendant pleaded son assault demesne, which was admitted to be a good plea in maihem. But the question was, What assault was sufficient to maintain such a plea in maihem? HOLT, C. J., said that Wadham Wyndham, J., would not allow it if it was an unequal return; but the practice had been otherwise, and was fit to be settled; that for every assault he did not think it reasonable a man should be banged with a cudgel; that the meaning of the plea was, that he struck in his own defense; that if A strike B, and B strikes again, and they close immediately, and in the scuffle B maihems A, that is son assault; but if upon a little blow given by A to B, B gives him a blow that maihems him, that is not son assault demesne. POWELL, J., agreed; for the reason why son assault is a good plea in maihem is, because it might be such an assault as endangered the defendant's life.

In the principal case HOLT directed the jury to find for the defendant. In Ld. Raymond, the first assault is stated to be tilting the form on which the defendant sat; in Rep. A. Q. (11 Mod.), that the plaintiff ran his finger towards the defendant's eye. The maihem was the biting off the plaintiff's finger.

OGDEN v. CLAYCOMB.

52 Ill. 365. 1869.

LAWRENCE, J., delivered the opinion of the court.

This was an action for assault and battery in which the jury

found for the defendant. The verdict was against the evidence, and there was error in the instructions for the defendant. From the first instruction the jury would understand, if the plaintiff advanced upon the defendant in a threatening manner, for the purpose of fighting, and a fight followed, the plaintiff could not recover, even though the defendant had far exceeded the just bounds of self-defense and inflicted an inhuman beating, provided he desisted as soon as the plaintiff asked him to do so. The rule is, on the contrary, that no more violence can be used than a reasonable man would, under the circumstances, regard necessary to his defense. If he strike a blow not necessary to his defense, or after all danger is past, or by way of revenge, he is guilty of an assault and battery. The third instruction tells the jury, among other things, that the plaintiff, in order to recover, should have been guilty of no provocation. This is error. It is wholly immaterial what language he may have used, so far as the right to maintain an action is concerned, and even if he went beyond words, and committed a technical assault, the acts of the defendant must still be limited to a reasonable self-defense. All the instructions for the defendant are pervaded to a greater or less degree by these errors, and should have been refused. The judgment must be reversed and the cause remanded.

Self-Defense—Cross-Actions.

McNATT v. McRAE.

117 Ga. 898, 45 S. E. 248. 1903.

Action by R. F. McRae against James McNatt. Judgment for plaintiff, and defendant brings error. Affirmed.

LAMAR, J. There was an affray in which both plaintiff and defendant were seriously injured. McRae was cut with a knife, the tendon of his forearm severed, permanently disabling him. McNatt was beaten and bruised about the head, and otherwise badly hurt. Each claimed that he had interposed as a peacemaker, and that the other had done him great bodily harm. Each prosecuted the other, but with what result does not appear. Subsequently McRae sued McNatt for the assault and battery, and McNatt filed an answer, which was the equivalent of the

general issue, besides which he filed a plea of set-off for the injury done him in the same fight. At the trial he withdrew the general denial, admitted the cutting, and justified on the ground that the same was done in self-defense. The trial resulted in a verdict for McRae, whereupon McNatt moved for a new trial. The motion was overruled, and he excepted.

Both parties being injured, and one having brought suit, and the other having filed a plea of set-off, we have the rather unusual instance of cross-actions for damages growing out of the same affray. While this is unusual, it is by no means legally impossible; for, even though the party first assaulted is entitled to recover for the battery, he may have used excessive force or beyond what was necessary for his defense, and thereby so put himself in the wrong as to become liable to the defendant, although the defendant was also liable to him. Or the plaintiff may even have made the first assault without justification, and rendered himself liable to the defendant; but if McNatt, with a deadly weapon, made an unnecessary counter assault, he would be liable for the damages thus inflicted. The criminal law (Pen. Code, 1895, § 73) furnishes constant instances of this class of cases. The original assailant may retire, decline further contest, and thereby put himself in a position where, in order to save himself from serious bodily harm, he may lawfully take the life of the party originally in the right. It was, we think, to this principle that the judge referred when he charged that, McNatt having filed pleas of justification and set-off, the burden was upon him, but if McNatt was injured, and "it was without fault on his part," the jury should determine "how much the defendant would be entitled to recover." Taken in connection with the context and the full charge, the jury were not misled. The court was simply instructing them to award damages to McNatt, if, at the time he was injured, he was in the right. Whether he began the difficulty or not, whether he had cut McRae in self-defense or not, yet if, at the time he was beaten, he was without fault, declining further contest, had offered to retire, was on the ground helpless, unable to defend himself, or was otherwise in a position where McRae had no legal right to assault or beat the defendant, he could recover from the plaintiff for damages then inflicted, even though McNatt had been originally in the wrong.

The errors complained of in other grounds of the motion afford no sufficient reason for the grant of a new trial. The judgment of the court below is therefore affirmed. All the justices concur.

Defense of Third Persons.

TOMPKINS v. KNUT.

94 Fed. 956. 1899.

EVANS, D. J. * * * It seems to the court that all parties were lawfully on the premises at the time, and that the whole case must turn, not upon the provisions of the contract, nor anybody's rights thereunder, but upon the facts immediately connected with the affray of January 25th. If this be correct, then the court upon the plaintiff's own showing, is clearly of opinion that the defendant had reasonable grounds for believing, when he appeared upon the scene, that his wife was apparently in great jeopardy and danger of her life in her struggle with a man so thoroughly armed as was the plaintiff; that if the defendant had then been armed, and had taken the plaintiff's life, the law would have excused him; that if he might, in the then apparently necessary defense of his wife, have taken the plaintiff's life, he was certainly excusable in doing for her protection, and probably his own, the lesser things of binding and disarming the plaintiff, so as to prevent further mischief until he could deliver plaintiff to a peace officer, precisely as he might be justified in binding a madman or a dangerous beast, who had as ample power to do mischief as this heavily-armed man had upon this occasion; and that it does not appear that defendant used more force than was apparently necessary to prevent great bodily harm to his wife, and probably others.

MELLEN v. THOMPSON.

32 Vt. 407. 1859.

Trespass for assault and battery. * * * Each of the defendants pleaded the general issue, and son assault demesne, and the defendant, Caleb Thompson, also pleaded that the

plaintiff made an assault upon the other defendant, being his brother, and that the defendant Caleb Thompson in defending his brother from such assault, did necessarily a little beat, bruise, etc., the plaintiff, etc., etc.

POLAND, J. The plaintiff's declaration sets forth a very aggravated assault and battery of the plaintiff by the defendants, and not only charges the defendants with cruelly beating the plaintiff, but also with kicking and choking him. * * * We think that each defendant's first plea, that the plaintiff made the first assault, and justifying his assault and battery of the plaintiff in self-defense, is a good answer to the whole declaration. The amount and kind of force which the law authorizes one to use in defense of his own person, depends entirely upon the extent and character of the attack upon him, and all the attending circumstances. He may use such kind and amount as is necessary for his own protection and safety, even to destroying the life of his assailant.

* * * * * * * * *

The plaintiff insists that each defendant's second plea is bad, because the law does not justify one in using force in defense of a brother against an unlawful attack. It is laid down in the elementary books that a battery may be justified by one in defense of a husband or wife, parent or child, master or servant, but in none that I have examined is it said that it may be in defense of a brother.

But it is also said by all the elementary writers, that it is a good defense to an action for an assault and battery, that it was committed to prevent a breach of the peace. We are not prepared to say that a man is any less justified by law in forcibly defending his brother against an unlawful attack, than he would be in defense of a stranger; but we think that every man is legally justified in the reasonable use of force for the prevention of unlawful violence to another's person, and thus preventing a breach of the peace. * * * If the plaintiff was making an assault, or was about to commit a battery upon the defendant's brother, the defendant would have the right to use gentle and moderate force to restrain him. If the plaintiff thereupon desisted, this was the extent to which the defendant had a right to use force at all.

Defense of Personal Property.

THRONE v. MEAD.

122 Mich. 273, 80 N. W. 1080. 1899.

MOORE, J. August 11, 1897, John Barger, at the request of the defendant, shot two dogs, one of which belonged to the plaintiff. Suit was brought by plaintiff against the defendant. From a judgment obtained by him, the defendant has appealed.

The record discloses that plaintiff was the owner of a spayed bitch dog, about four years old, which he testified he kept chiefly for hunting minks and coons. He says he kept her tied up nights, and a good deal of the time in the daytime. He testified he never knew she worried or killed any sheep. It was shown by some of the witnesses for the plaintiff that the dog was frequently away from home, and among flocks of sheep. One of them testified that, previous to the shooting of the dogs, he had seen them chasing sheep belonging to the defendant. He saw the dog which was shot grab a buck belonging to Mr. Jackson, and soon thereafter the sheep was found dead. It was shown on the part of the defense that, shortly before the two dogs were killed, they killed a buck and several lambs belonging to Mr. Jackson, whose farm adjoined the farm of Mr. Mead, and in July they chased the sheep of Mr. Parker, another neighbor, who drove them away. The defendant had a flock of lambs he had weaned, which he kept west of his house.

He saw the dog belonging to the plaintiff chasing these lambs the first week in August, and got his gun to shoot her, but she got away before he could do so. Before the dogs were killed, the plaintiff had been told about their killing the buck and lambs belonging to Mr. Jackson. On the morning the dogs were killed, their owners were not with them. The defendant did not see the dogs until after they were killed, but his attention was called to the fact that they were on his premises, by Mr. Barger; and when he got the gun he knew it was for the purpose of shooting the dog that had chased his sheep, and killed the sheep belonging to Mr. Jackson.

It is claimed by counsel for plaintiff that as the dogs had not done, or threatened to do, any damage to defendant's sheep on the day they were shot, he had no right to kill them; citing Bowers v. Horen, 93 Mich. 420, 53 N. W. 535, 17 L. R. A. 773. An inspection of the case will show it is not in point. If the defendant had shot the dog when he saw him chasing his lambs the week before, he would have acted strictly within the provisions of the statute (Miller's Comp. Laws, § 5592). Had Mr. Mead notified the plaintiff in writing of what his dog had done to the lambs in August, it would have been his duty to have had the dog killed within forty-eight hours, and he would have subjected himself to a penalty for failure to do so. This would have been equally true if Mr. Jackson or Mr. Parker had given a like notice of what the dog had done to their sheep. The statute does not regard with much favor a sheep-killing dog.

When the owner of sheep sees a pair of sheep-killing dogs in his inclosure unaccompanied by any person, and has caught one of them, a few days before, chasing his lambs, he is not obliged to wait until they have again begun their cruel work, before he can take effective measures to protect his property. Under the undisputed facts in the case, a verdict should have been directed for defendant.

LIVERMORE v. BATCHELDER.

141 Mass. 179. 1886.

Tort for killing the plaintiff's dog. * * * On said February 20, the plaintiff's dog, with another dog, came upon the defendant's premises, and there killed and maimed hens of the defendant, which were in his hen-house or shed. The dogs were driven away, and, in about fifteen minutes afterwards, came again upon the defendant's premises, and were running towards the same shed and hen-house of the defendant, when the defendant, having reasonable cause to believe that the dogs were proceeding to maim and kill others of his hens in said shed and hen-house, shot and killed the plaintiff's dog.

Upon these facts, the judge ruled that the defendant's killing of the plaintiff's dog under the circumstances stated was not,

in law, justifiable; and thereupon found and ordered judgment for the plaintiff. The defendant alleged exceptions.

HOLMES, J. The ruling of the court, as we understand it, meant that the facts found, without more, did not disclose a justification for killing the plaintiff's dog. It was found that the defendant had reasonable cause to believe that the dog was proceeding to maim and kill his hens, but not that he had reasonable cause to believe that it was necessary to kill the dog in order to prevent him from killing the hens. The justification, therefore, was not made out.

BOWERS v. HOREN.

93 Mich. 420. 1892.

GRANT, J. Defendant shot the plaintiff's dog. Plaintiff brought suit in justice's court, and recovered verdict and judgment for $50. Defendant appealed to the circuit court, where another jury gave him a verdict for $75, and the defendant appealed to this court. The court below instructed the jury that the defendant was not justified in killing the dog, and that the only question for them to determine was the value of the dog.

The charge was correct. The defendant, one morning, saw the dog in front of his house, and found that he had left some tracks on his freshly painted porch. He thereupon procured his gun and shot the dog. Defendant's wife testified that one night she found the dog in the henhouse; but no damage was done, except that the next morning she found one egg broken. The only other justification offered for killing the dog was that he came around the defendant's house at night, chased cats into the trees, and barked. Defendant knew that plaintiff owned the dog, but never informed him that the dog gave him any annoyance.

The law does not justify one in killing his neighbor's valuable dog under these circumstances. It might as well be contended that it is justifiable for one to shoot a neighbor's horse because he is in the habit of breaking into his inclosure, or making a noise around his house at night.

Defense of Real Property.

COMMONWEALTH v. CLARK.

2 Met. 23 (Mass.). 1840.

On the trial of the defendant, in the Court of Common Pleas, before STRONG, J., for an assault and battery on Lemuel Briggs, it was proved that the defendant, with another man, entered Briggs's close, and was using his grindstone, when Briggs went to them, and repeatedly ordered the defendant to go from his premises, and the defendant repeatedly told him he would not go, but would remain there as long as he pleased. Immediately after this, according to the testimony of one witness, Briggs "put the flat of his hand on both cheeks of the defendant's face." Another witness testified that "Briggs brushed the defendant's cheek;" and it was testified by a third witness that Briggs "struck the defendant on the side of his face twice with the flat of his hand," and that "blood was drawn thereby, probably produced by the nails of the hand."

The court instructed the jury that Briggs had a right, after requesting the defendant to remove from his premises, and his refusal, to use proper and reasonable force to remove him; that the jury must determine, from the testimony, what the transaction was; how much and what kind of force Briggs used; and if, in their opinion, he used more force than was necessary; or if the force was not appropriate and calculated to effect the object of removing him, then they should consider Briggs as having committed the first assault. But if they considered the force, which he used, as necessary and proper, and also appropriate and calculated to effect the object, then he would be justified in what he did, and would not have committed the first assault.

The jury found the defendant guilty, and the defendant alleged exceptions to these instructions of the court.

* * * * * * * * *

SHAW, C. J. It was contended in behalf of the defendant, that the complainant, Briggs, had no right by law to commit a battery on the defendant, in order to remove him from his premises. But the difficulty in maintaining this position in

point of law is this: that every touching of another's person, wilfully or in anger, without his consent, is technically a battery, unless justifiable. But if justifiable, then it is not necessarily either a battery or an assault. 5 Dane Ab. 584. Whether the act, therefore, in any particular case, is an assault and battery, or a gentle imposition of hands, or application of force, depends upon the question whether there was a justifiable cause. It would, therefore, be absurd to say it cannot be justifiable because it is a battery. But the true questions, we think, are, first, whether the party justifying had a good reason for using force; and if so, second, whether such force was appropriate in kind, and suitable in degree, to accomplish the purpose.

It is well settled that a person may, after requesting another to remove from his premises, and his refusal to do so, use force for the purpose of removing him. Weaver v. Bush, 8 T. R. 78. As the kind and degree of force, proper to remove a trespasser, must depend upon the conduct of the trespasser in each particular case, the question whether it was suitable and moderate in any particular case, is a question of fact to be left to the jury. In the present case, there was some contrariety in the statements of the several witnesses, who testified to the transaction. The court were requested to instruct the jury that if the act of Briggs was, in their opinion, a battery, it was not a proper kind of force to be used to remove the defendant from his premises, and so would be the first assault, and justify the defendant. But the court could not properly give this instruction; because, whether it was a battery or not, depended on the question whether it was suitable in kind and degree to accomplish his justifiable object.

If it be said that a "battery," in this prayer for an instruction, was not used in its technical sense, but intended striking, or the violent infliction of blows, then the instruction was, in effect, given as prayed for, by the instruction that Briggs could justify no application of force which was not suitable, in kind and degree, to the occasion.

We are of the opinion that the instructions were correct and were expressed with accuracy and caution, and with the necessary qualifications, and were conformable to the rules of law.

NEWCOME v. RUSSELL.

133 Ky. 29, 117 S. W. 305. 1909.

CARROLL, J. * * * From this line of authorities, it will be seen that it is the law not only in this State, but everywhere, that a mere trespass upon the premises of another—such as was committed by appellee—will not justify the owner of the premises in either shooting or wounding the trespasser, unless the trespass be accompanied by acts that amount to an assault upon the person of the owner such as would warrant him in exercising the right of self-defense to protect his person. Chapman v. Commonwealth, 15 S. W. 50, 12 Ky. Law Rep. 704. And when this right of self-defense exists, his act will be excusable or justifiable as the circumstances may appear—not on account of the trespass alone, but because of the attack upon the person. If the argument of counsel for appellant was declared to be the law, it would shock the good sense of the people of this State, and they would be greatly surprised to learn that a man had the right to shoot a person who, upon outlying premises, was committing the trifling trespass of tearing down a fence. The person aggrieved by trespass of this nature may resort to such means, not involving life or limb, as may be necessary to prevent the trespass and remove the trespasser from the premises. If these means do not accomplish the desired result, he must resort to the orderly and peaceable methods afforded by the law for the redress of such wrongs. It should be observed that the principle we have announced does not apply to a trespass committed under circumstances of aggravation upon the home of a person. When a man's house is invaded, after a request to desist, the owner may resort to such means as are necessary in the exercise of a reasonable judgment to expel the intruder.

Recaption of Personal Property.

CHAMBERS v. BEDELL.

2 W. & S. 225 (Pa.). 1841.

This was an action of trespass quare clausum fregit, in which the defendant pleaded not guilty. The parties were owners of

adjoining tracts of land, and disputed about their partition line. The plaintiff cut a quantity of rails upon the land in dispute, and hauled them to another part of his land, which was not in dispute. The defendant went there in the night and hauled the rails away, for which this action of trespass was brought. It appeared clearly on the trial that the land where the rails were cut belonged to the plaintiff. The court below, in answer to a point put by the defendants, instructed the jury, that whether the land belonged to the plaintiff or not, he was at least entitled to recover nominal damages; but that the evidence clearly and conclusively established the plaintiff's title, and he was therefore entitled to recover the value of the property taken in damages. * * *

PER CURIAM. It is certain, that if the chattel of one man be put upon the land of another by the fault of the owner of the chattel, and not by the fault or with the connivance of the owner of the land, the owner of the chattel cannot enter to retake it; but that if it be put there without the fault or consent of either party, the owner of chattel may enter and take it peaceably, after demand and refusal of permission, repairing, however, any damage which may be occasioned by his entry. So, also, where the parties are in equal default, for instance, by omitting to repair a partition fence, by reason of which the cattle of the one happens to stray into the close of the other. But all the books agree, that where a chattel escapes from the possession of its owner by his consent, exclusive negligence, or other default, he cannot pursue it into the close of another, without becoming a trespasser by his entry; but that he may lawfully enter and retake his property, where it has been wrongfully taken or received by the owner of the land. Now, if the property in the rails in question had been in the defendant, the plaintiff who had piled them on his land, could not have recovered even nominal damages for the defendant's entry to remove them; and in this respect the direction would have been wrong. But it was in clear and uncontradicted proof, that the defendant, Chambers, had not even a colorable title to the land where the rails were grown and made, and consequently not even a colorable title to enter on the plaintiff's land in order to carry them away; and the inaccu-

racy of the charge, in this abstract particular, was therefore immaterial.

SHELLABARGER v. MORRIS.

115 Mo. App. 566, 91 S. W. 1005. 1905.

BROADDUS, P. J. * * * Defendant's first contention is that she had the right to pursue, and use all force reasonably necessary for the recapture of her chicken. * * * The defendant seems to rely on the principle announced in said case [State v. Dooley, 121 Mo. 591, 26 S. W. 558], and in that of State v. Evans, 124 Mo. 397, 28 S. W. 8; State v. Forsythe, 89 Mo. 667, 1 S. W. 834. The cases cited do not apply, for the reason that, on the one hand, the property in dispute was not in the possession of the defendant owner, and on the other hand, the right of the owner to pursue and recapture her property does not include the right to enter the premises of another and commit breach of the peace for that purpose, unless her property has been stolen or criminally detained by the owner of the premises. * * *

But as we do not find any authority, nor is there any good reason for holding, that where an owner finds his property on the premises of another, it not having been taken from his possession in violation of the criminal law, he would be authorized to commit a breach of the peace in his effort to recover it. For instance, if the owner's horse should stray upon the premises of another, he would not be justified in entering such premises and committing an assault upon the other in the effort to recover such horse. A different rule would apply from that where the owner is deprived of the possession of his property by force and he pursues the wrongdoer and recaptures it also by force, or where his property has been stolen. The defendant's chicken strayed upon plaintiff's premises, she caught it, and while she was holding it, according to plaintiff's evidence, she said, "I want my chicken," and struck plaintiff on the head. In so doing she committed a breach of the peace, which the law does not justify. And the instruction asked by the defendant and refused by the court, to the effect that she might use "all force and means necessary to recapture her chicken, short of such as she knew would endanger the life of the plaintiff," etc., was

properly refused. The rule of law that the owner may use all reasonable force to defend the possession of his property has no application. For, in the defense of one's property the law is very indulgent, and permits at least the use of all reasonable force to repel the aggressor.

Entry Upon Lands to Repossess Them.

STERLING v. WARDEN.

51 N. H. 217. 1871.

FOSTER, J. * * * It is clearly the English law, and, as we believe, the strongly preponderating opinion of the American courts, that no civil action lies against a landlord for regaining with force the possession of the demised premises, unless there is an excess of force, and then only for such excess. * * * The statutes of forcible entry and detainer in England, and in those of the United States where they still prevail, invariably specify the penalty incurred; and these statutes, and proceedings under them, in no way affect the civil character of the act of forcible entry, nor is any civil or common law liability to be implied from them. * * * In Harvey v. Brydges, 14 M. & W. 437, Parke, B., lays down the law in these terms: "Where a breach of the peace has been committed by a freeholder, who, in order to get possession of his land, assaults a person wrongfully holding possession against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification, that the plaintiff was in possession of the land against the will of the defendant, who was the owner, and that he entered upon it accordingly even though in so doing a breach of the peace was committed." Alderson, B., concurred. And this doctrine has been fully confirmed in Blades v. Higgs, 10 C. B. N. S. 713. See also Pollen v. Brewer, 7 C. B. N. S. 371; Davison v. Wilson, 11 Ad. & E. N. S. 890; Burling v. Reed, 11 Ad. & E. N. S. 905; Davis v. Burrell, 10 C. B. 821; Patrick v. Colerick, 3 M. & W. 483. The result of the English authority then is, that an entry by the landlord with force is illegal only to the extent of the penalties provided by the statutes of forcible

entry and detainer, or other criminal process, and that no right of common law action by the tenant is to be inferred from the statutory prohibition.

If we turn now to the American cases, we shall find the law, as indicated by the English authorities, even more strongly and unequivocally maintained. Such is the purport of the decisions, without disturbance of the current, setting in one direction, in the States of Massachusetts, New York, Pennsylvania, North Carolina, South Carolina, New Jersey, Kentucky, Missouri, and probably in some other jurisdictions. And in our own State, although the subject does not seem to have been largely discussed (perhaps because the principle has been regarded as too firmly established to admit of serious question), the authorities point unmistakably in the same direction.

BEDDALL v. MAITLAND.

L. R. 17 Ch. Div. 174 (Eng.). 1881.

FRY, J. The question which I reserved for further consideration arises on the defendant's counter-claim. The claim subdivides itself into two heads,—the one for the forcible entry and eviction, the other for the injury done to the defendant's furniture and effects; and, in my judgment, separate considerations arise with regard to these two heads. According to the evidence the defendant was * * * by the plaintiff's permission in the exclusive possession of the house. That permission, however, had been withdrawn before the 8th of January, and the defendant had retained possession and was then in possession as a wrongdoer. Upon the evidence I come to the conclusion that a forcible entry was made on the 8th of January. * * * The questions that then arise are complicated by this consideration, that, if the possession of the defendant was unlawful, the forcible entry of the plaintiff was also unlawful. The taint of unlawfulness attaches to them both. The unlawfulness of the plaintiff's entry arises under the statute 5 Rich. 2, stat. 1, c. 8, which enacts, "That none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy man-

ner. And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the King's will." This statute creates one of the great differences which exist in our law between the being in possession and the being out of possession of land, and which gave rise to the old saying that possession is nine points of the law. The effect of the statute is this, that when a man is in possession he may use force to keep out a trespasser; but, if a trespasser has gained possession, the rightful owner cannot use force to put him out, but must appeal to the law for assistance. And the result of the cases appears to me to be this, that, inasmuch as the possession of the defendant was unlawful, he can recover no damages for the forcible entry of the plaintiff. He can recover no damages for the entry, because the possession was not legally his, and he can recover none for the force used in the entry, because, though the statute of Rich. 2 creates a crime, it gives no civil remedy. But, in respect of the independent wrongful acts which are done in the course of or after the forcible entry, a right of action does arise, because the person doing them cannot allege that the acts were lawful unless justified by a lawful entry; and he cannot plead that he has a lawful possession. This, as it appears to me, is the result of the cases. The leading authority on the subject is Newton v. Harland, 1 M. & Gr. 644, a case in which a great difference of opinion was evinced between the learned judges before whom it came. It was tried three times, first before Baron Parke, secondly before Baron Alderson, and thirdly before Mr. Justice Coltman, and came three times before the Court of Common Pleas in Banc, and it must, in my judgment, be taken as having settled the law on the subject. The action was brought to recover damages for an assault committed on the plaintiff's wife in the course of a forcible entry by the defendant into some apartments which had been occupied by the plaintiff as tenant to the defendant. The plaintiff remained in the apartments after the expiration of his term, and the defendant entered by force and turned out the plaintiff's wife and family, and in so doing assaulted the wife. The defendant pleaded that the acts were done in defense of his possession of the house, and the Court of Common Pleas held, contrary to the opinions of Baron Parke and Baron Alderson, that the

defense failed, because the defendant's entry was unlawful. On the other hand, when the cause of action alleged is simply the eviction, no damages can be recovered. That is the result of Pollen v. Brewer, 7 C. B. N. S. 371, and it is also clear from other cases. No doubt, in Harvey v. Brydges, 14 M. & W. 437, Baron Parke and Baron Alderson expressed their disapproval of Newton v. Harland, but they were the judges who had tried that case, and whose opinions had been overruled by the court in Banc. * * * I think that none of these cases in any way countervail Newton v. Harland, which I take to have established this, that there is a good cause of action whenever in the course of a forcible entry there has been committed by the person who has entered forcibly an independent wrong, some act which can be justified only if he was in lawful possession. I come, therefore, to the conclusion that, in respect of his claim for damages for forcible entry and eviction, the defendant cannot succeed, but that, in respect of his claim for damages for the injury done to his furniture, which the plaintiff could only justify by a lawful possession, the defendant is entitled to succeed.

CHAPTER VI.

EXCUSABLE TRESPASSES—NECESSITY OR PUBLIC POLICY—DISCIPLINE—ABATEMENT OF NUISANCES—ARREST WITHOUT WARRANT —JUDICIAL PROCESS.

Necessity or Public Policy.

UNITED STATES v. PACIFIC RAILROAD COMPANY.

120 U. S. 227. 1886.

[The Pacific Railroad Company sought to recover from the United States government some $136,000 for services rendered in the transportation of passengers and freight between 1867 and 1872. In Missouri, during the Civil War, a number of the bridges belonging to the railroad company had been destroyed, some by the Federal troops, and some by the Confederate troops. Four of the bridges had been rebuilt by the government, at a cost of some $180,000. In the suit by the railroad company to recover for its services mentioned, the government sought to offset the cost of these four bridges against the demand of the railroad.]

FIELD, J. * * * The question is whether the company is chargeable with the cost of these bridges. * * * It has been held by this court in repeated instances that, though the late war was not between independent nations, yet, as it was between the people of different sections of the country, and the insurgents were so thoroughly organized and formidable as to necessitate their recognition as belligerents, the usual incidents of a war between independent nations ensued. The rules of war, as recognized by the public law of civilized nations, became applicable to the contending forces. Their adoption was seen in the exchange of prisoners, the release of officers on parole, the recognition of flags of truce, and other arrangements designed to mitigate the rigors of warfare. The inhabitants of the Con-

federate States on the one hand, and of the States which adhered to the Union on the other, became enemies, and subject to be treated as such, without regard to their individual opinions or dispositions; while during its continuance commercial intercourse between them was forbidden, contracts between them were suspended, and the courts of each were closed to citizens of the other.

The war, whether considered with reference to the number of troops in the field, the extent of military operations, and the number and character of the engagements, attained proportions unequalled in the history of the present century. More than a million of men were in the armies on each side. The injury and destruction of private property caused by their operations, and by measures necessary for their safety and efficiency, were almost beyond calculation. For all injuries and destruction which followed necessarily from these causes no compensation could be claimed from the government. By the well-settled doctrines of public law it was not responsible for them. The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. The safety of the State in such cases overrides all considerations of private loss. Salus populi is then, in truth, suprema lex. * * *

While the government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field, or measures taken for their safety and efficiency, the converse of the doctrine is equally true, that private parties cannot be charged for works constructed on their lands by the government to further the operations of its armies. Military necessity will justify the destruction of property, but will not compel private parties to erect on their own lands works needed by the government, or to pay for such works when erected by the government. The cost of building and repairing

roads and bridges to facilitate the movements of troops, or the transportation of supplies and munitions of war, must, therefore, be borne by the government. * * *

It follows from these views, that the government can make no charge against the railroad company for the four bridges constructed from military necessity. The court will leave the parties where the war and the military operations of the government left them.

PROCTOR v. ADAMS.

113 Mass. 376. 1873.

Tort, in the nature of trespass quare clausum fregit, for entering the plaintiff's close and carrying away a boat. * * * It appeared that the premises described in the declaration were a sandy beach on the sea side of Plum Island, and that the defendants went there, between high and low water mark, January 19, 1873, and against the objection and remonstrances of the plaintiff's tenant, carried away a boat worth $50, which they found lying there.

* * * * * * * * *

The defendants requested the court to rule, upon the case presented, the law would imply a license, but the court declined so to rule. The defendants then declined to go to the jury, and the court instructed the jury to return a verdict for the plaintiff for $51, and reported the case to this court. * * *

GRAY, C. J. The boat having been cast ashore by the sea, was a wreck, in the strictest legal sense. 3 Bl. Com. 106. Chase v. Corcoran, 106 Mass. 286. Neither the finders of the boat, nor the owner of the beach, nor the Commonwealth, had any title to the boat as against its former owner. * * * But the owner of the land on which the boat was cast was under no duty to save it for him. Sutton v. Buck, 2 Taunt. 302. If the boat, being upon land between high and low water mark, owned or occupied by the plaintiff, was taken by the defendants, claiming it as their own, when it was not, the plaintiff had a sufficient right of possession to maintain an action against them. Barker v. Bates, 13 Pick. 255; Dunwich v. Sterry, 1 B. & Ad. 831. But if, as the evidence offered by them tended to show, the boat was

in danger of being carried off by the sea, and they, before the plaintiff had taken possession of it, removed it for the purpose of saving it and restoring it to its lawful owner, they were not trespassers. In such a case, though they had no permission from the plaintiff or any other person, they had an implied license by law to enter on the beach to save the property. It is a very ancient rule of the common law, that an entry upon lands to save goods which are in jeopardy of being lost or destroyed by water, fire, or any like danger, is not a trespass. 21 Hen. VII. 27, 28, pl. 5; Bro. Ab., Trespass, 213.

CAMPBELL v. RACE.

7 Cush. 408 (Mass.). 1851.

This was an action of trespass for breaking and entering the plaintiff's close. The defendant pleaded the general issue, and specified a right of way of necessity, resulting from the impassable state of the adjoining highway, by obstructions with snow. The defendant introduced evidence in support of his plea. * * * But the judge ruled, that these facts constituted no defense to the action; and a verdict having been returned accordingly for the plaintiff, the defendant alleged exceptions.

BIGELOW, J. It is not controverted by the counsel for the plaintiff, that the rule of law is well settled in England, that where a highway becomes obstructed and impassable from temporary causes, a traveler has a right to go extra viam upon adjoining lands, without being guilty of trespass. The rule is so laid down in the elementary books, and it is fully supported by the adjudged cases. * * * Such being the admitted rule of law, as settled by the English authorities, it was urged in behalf of the plaintiff in the present case, that it had never been recognized or sustained by American authors or cases. But we do not find such to be fact. * * * These authorities would seem to be quite sufficient to justify us in the recognition of the rule. But the rule itself is founded on the established principles of the common law, and is in accordance with the fixed and uniform usage of the community. * * *

The plaintiff's counsel is under a misapprehension in supposing that the authorities in support of the rule rest upon any peculiar or exceptional principle of law. They are based upon the familiar and well-settled doctrine, that to justify or excuse an alleged trespass, inevitable necessity or accident must be shown. If a traveler in a highway, by unexpected and unforeseen occurrences, such as a sudden flood, heavy drifts of snow, or the falling of a tree, is shut out from the traveled paths, so that he cannot reach his destination, without passing upon adjacent lands, he is certainly under a necessity so to do. It is essential to the act to be done, without which it cannot be accomplished. Serious inconveniences, to say the least, would follow, especially in a climate like our own, if this right were denied to those who have occasion to pass over the public ways. Not only would intercourse and business be sometimes suspended, but life itself would be endangered. * * * Such a temporary and unavoidable use of private property, must be regarded as one of those incidental burdens to which all property in a civilized community is subject. In fact, the rule is sometimes justified upon the ground of public convenience and necessity. Highways being established for public service, and for the use and benefit of the whole community, a due regard for the welfare of all requires, that when temporarily obstructed, the right of travel should not be interrupted. * * * The rule does not, therefore, violate the principle that individual convenience must always be held subordinate to private rights, but clearly falls within that maxim, which makes public convenience and necessity paramount. * * *

From what has already been said, the limitations and restrictions of the right to go upon adjacent lands in the case of obstructions in the highway can be readily inferred. Having its origin in necessity, it must be limited by that necessity; cessante ratione, cessat ipsa lex. Such a right is not to be exercised from convenience merely, nor when, by the exercise of due care, after notice of obstructions, other ways may be selected and the obstructions avoided. But it is to be confined to those cases of inevitable necessity or unavoidable accident, arising from sudden and recent causes which have occasioned temporary and impassable obstructions in the highway. What shall constitute such inevitable necessity or unavoidable accident, must

depend upon the various circumstances attending each particular case. The nature of the obstruction in the road, the length of time during which it has existed, the vicinity or distance of other public ways, the exigencies of the traveler, are some of the many considerations which would enter into the inquiry, and upon which it is the exclusive province of the jury to pass, in order to determine whether any necessity really existed, which would justify or excuse the traveler. In the case at bar, this question was wholly withdrawn from the consideration of the jury, by the ruling of the court. It will therefore be necessary to send the case to a new trial in the Court of Common Pleas. Exceptions sustained.

Discipline.

ROWE v. RUGG.

117 Iowa 606, 91 N. W. 903. 1902.

SHERWIN, J. This is an action by a child of eight years of age to recover of the defendant, who is his aunt, damages for corporal punishment administered by her. That she moderately chastised the child was admitted by the defendant, and the jury found that it was not, in fact, excessive. It conclusively appeared that it was authorized by the plaintiff's mother, and the only questions before us are whether the mother has such authority over her own child during the life of her husband, and while he is the head of the family, that she may delegate her power in the premises to another, and whether one acting under such delegated authority may legally inflict moderate punishment upon a minor child.

We first inquire whether either parent may legally authorize a third person to administer such chastisement to their child as they might themselves lawfully inflict. It is the general rule that those having the care, custody, and control of minor children may, for the purpose of proper discipline and control, administer such moderate and reasonable chastisement as shall effect the desired object, and this rule has been applied generally to all those occupying a position in loco parentis. The law continually looks to the future of the child, as well as to its present condition; and it is its policy, in dealing with the various

questions which are constantly arising affecting its care and custody, to determine the line of action that shall best subserve its present and future welfare. The duties which the parent owes to the child, as well as to the public, in the matter of its maintenance, protection, and education, have generally been held to give the parent or other person occupying such relation the power to thus discipline and correct it. While we are not prepared to hold that a parent may, without restraint, lawfully authorize any and all persons to administer physical punishment to his or her child, we see no reason why such authority may not be given under certain circumstances. For instance, if a child is placed in the temporary care of some person, in whom the parent has great confidence, on account of relationship or otherwise, why may not authority to properly correct the child be delegated for the time being? Or suppose a parent is physically unable to administer needed punishment; why may he not legally direct a friend to do so for him? The child and society are as fully protected in such case as in one where the punishment was administered by the parent, because, if immoderate and unreasonable, the same consequences would follow in both cases. And on the other hand, the failure to correct might be detrimental to the child. As bearing upon this question, see Bonnett v. Bonnett, 61 Iowa, 199, 16 N. W. 91, 47 Am. Rep. 810.

The mother, under section 3192 of the Code, is "equally entitled to" the "care and custody" of the children. This must necessarily mean that she is also equally entitled to control and discipline them. Being given this power, it must follow that, if the father may authorize another to punish his child, the mother may do so.

The instructions of the trial court were in harmony with these views, and the judgment is affirmed.

CLASEN v. PRUHS.

69 Neb. 278, 95 N. W. 640. 1903.

Action by Augusta Pruhs against Margaret Clasen. Judgment for plaintiff, and defendant brings error. Affirmed.

OLDHAM, C. This suit was prosecuted by the plaintiff below, a minor, by her next friend, to recover damages for

alleged inhuman and cruel treatment suffered while in the care and custody of the defendant. It appears from the record that when the plaintiff was about six years of age she came with her brother from her home in Germany, with the consent of her parents, to make her home with the defendant, who was her maternal aunt, and resided near Hallam, Nebraska; that she remained under the care and protection of the defendant for six or seven years, when the defendant took her back to her parents in Germany, and left her there. The following year the plaintiff returned with her parents to America, and located near Hallam, and shortly after her return this cause of action was instituted.

The allegations of inhuman treatment are that the plaintiff was cruelly and unnecessarily tortured, beaten, and whipped on numerous occasions, and improperly clothed and fed, by defendant, while under her care and custody, and that such treatment resulted in permanent injuries to her health and growth, all of which was denied by the defendant. It is admitted that during the time the plaintiff lived with the defendant the relationship and authority of the defendant over the plaintiff was that of parent over a child. So that the only question at issue in the case was as to whether the plaintiff was subjected to inhuman and brutal treatment in excess of the authority properly reposed in the defendant during the time defendant stood in loco parentis to the child. The testimony in the case is exceedingly voluminous and on many points is sharply conflicting. The trial resulted in a verdict and judgment for the plaintiff in the sum of $2,000, and defendant brings error to this court.

* * * * * * * * *

The objection, however, which is seriously and forcibly urged against the instructions is that they take a too restricted view of the right of a parent, or one in loco parentis, to administer corporal punishment to a child. It is said in the brief that the instructions substitute the judgment of the jury for the judgment of the parent, in determining the necessity and extent of the punishment that may be administered for the good of the child. It is further urged that a parent ought to be considered as acting in a judicial capacity when he corrects his child, and should not be held liable, even if the punishment should appear

to the triers of fact to be unreasonably severe, and in no measure proportionate to the offense; that the only instance in which a parent should be held liable for the punishment of a child is when he acts in bad faith and from wicked impulses, and when the punishment is of such a nature as to seriously injure the life, limbs, or health of the child. An instruction embodying this view of the law was requested by defendant and refused by the court. * * *

That much of the welfare of society rests upon the proper exercise of parental authority is self-assertive, but that there is and should be a reasonable limitation on the right of parents to punish their offspring is an elemental principle of modern civilization. The question then is, what is the right, and what the proper limitation of the right, and who shall judge when the right has been exceeded? A parent, teacher, or master is not liable either civilly or criminally, for moderately correcting a child, pupil, or apprentice, but it is otherwise if the correction is immoderate and unreasonable. 1 Clark & Marshall, Law of Crimes, 133; 1 McClain, Criminal Law, § 242; 3 Greenleaf on Evidence [16th ed.] § 63; 1 Wharton's Crim. Law [10th ed.] § 631. In fact, the rule seems to be universally recognized by the courts of this country. If the authority to punish be limited by reason and moderation, who, then, on sound principles, should determine whether such authority has been used in excess of its proper limits—the parents administering the punishment, or the triers of fact in a court where complaint has been made? While some authority is cited tending to support the theory that where the punishment falls short of maiming or disfiguring the body, or seriously injuring or endangering life and health, the judgment of the parent is final, and he cannot be held to answer unless it is proved that the punishment was maliciously inflicted—the leading case in support of this doctrine being Jones v. State, 95 N. C. 588, 59 Am. Rep. 282—yet the great weight of American authority seems to be that whether or not the parent, guardian, or schoolmaster has administered unreasonable, unnecessary, and cruel punishment to a child under his care is a question of fact to be determined by the jury. 21 Am. & Eng. Ency. of Law (1st. ed.) 771; Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156; Hinkle v. State, 127 Ind. 490, 26 N. E. 777; Fletcher v. People, 52 Ill. 396;

Johnson v. State, 21 Tenn. 283, 36 Am. Dec. 322; State v. Washington, 104 La. 443, 29 So. 55, 81 Am. St. Rep. 141; Patterson v. Nutter, 78 Me. 509, 7 Atl. 273, 57 Am. Rep. 818; Commonwealth v. Randall, 4 Gray 36 (Mass.). It would, therefore, seem that the learned trial court followed the trend of a long line of well-considered cases when they submitted to the jury the question of the reasonableness of the punishment inflicted, and predicated plaintiff's right of recovery on proof of the fact that the punishment administered was unreasonable and unnecessary under all the circumstances.

[The conclusion of the Commissioner was approved by the Court.]

MICHAELSON v. DENISON.

17 Fed. Cas. No. 9,523. 1808.

This was an action of assault and battery.

LIVINGSTON, Circuit Judge, in summing up, after taking notice of the weapon, which was not dangerous, the mode of punishment, which was not unusual, and the degree which, however severe, was less than sufficient to reduce the plaintiff to submission, recognized the right of the master, during the voyage, to correct a mariner for disobedience to any reasonable commands, and for insolence and other offenses. The punishment, in its nature, is not limited to confinement, corporal chastisement being often necessary and proper; and as to its extent, depends upon the circumstances of the case, the aggravation of the offense, or the continuance of the disobedience. This is a salutary authority and ought to be maintained. Without it, it would be impossible to navigate our vessels.

Abatement of Nuisances.

JAMES v. HAYWARD.

Croke, Car. 184 (Eng.). 1630.

Trespass for breaking his close, and pulling up, cutting, and casting down a gate.

The defendant justifies, because the gate was placed cross the highway, and so fixed that the King's subjects could not pass

without interruption by reason of the said gate, to the nuisance of the King's subjects; and therefore he pulled up, cut, and cast down the said gate to use the said way.

The plaintiff shows, that he set up two posts on each side of the way, and hung the gate upon one of the said posts, for the preservation of the springs of the wood there from cattle, so as the subjects might pass the said way without prejudice or impediment at their pleasure; and traverseth that the gate was so fixed and tied that the King's subjects could not pass without interruption by the gate. The defendant, upon that plea, demurred.

The first question was, whether the erecting of a gate across a highway, which may be opened and shut at the pleasure of passengers, be a common nuisance in itself in the eye of the law? it being an open gate fixed upon hinges that subjects may pass the said way at their pleasure.

Secondly, admitting it to be a nuisance, whether every one may pull and cast down the said gate at their pleasure?

HYDE, C. J., JONES, and WHITLOCK, for the first, conceived, that the erecting of a gate, although it be not locked or tied, but that every subject may open it and have passage at his pleasure, is a nuisance; for it is not so free and easy a passage as if no inclosure had been; for women and old men are more troubled with opening of gates than they should be if there were none. * * *

For the second, they held, that admitting it to be a nuisance, although the usual course is to redress it by indictment, yet every person may remove the nuisance; and HYDE, Chief Justice, JONES, and WHITLOCK, allowed, that the cutting of the gate was lawful; whereupon judgment was for the defendant.

HUBBARD v. PRESTON.

90 Mich. 221. 1892.

LONG, J. On November 9, 1890, defendant shot and killed plaintiff's dog. An action was commenced in justice's court, where defendant had judgment. On appeal to the circuit court for Wayne county, the cause was tried before a jury. The only question submitted to the jury on the trial in the circuit court

was the value of the dog, which the jury found to be $25, and verdict and judgment were entered for that amount. Defendant brings error.

On the trial the defendant introduced testimony tending to show justification for the killing. The court permitted the testimony to be introduced, but held that it did not amount to a justification. The only question raised in this court is whether the court should have submitted that branch of the case for the determination of the jury.

We think the court was in error in not so doing. It appeared that the defendant did not keep a dog; that he lived on Bagg street, city of Detroit, and for eight days prior to the shooting he and his family had been greatly annoyed by the congregation of a large number of dogs about his premises, barking, quarreling, and fighting there; that they came every night upon his lawn, about his house, when it became dark (on two occasions he counted twelve dogs), and that they kept up their cries all night at intervals; that he complained to the police on three different days prior to the killing, but without any relief, and he had driven them away on several nights; that the noise made by them kept the members of his family awake, and seriously annoyed them; that he did not know the owners; that on the night he killed plaintiff's dog he drove them away twice, but they returned; that he could not get near them, but they would return; that they became an intolerable nuisance, and finally, about eight o'clock in the evening, he went out with his revolver, and shot among them while on his lawn. He did not know who owned any of them, and did not shoot at any particular dog.

The defendant had a right to protect his family from such nuisance; and it was a question for the jury whether he used such means as were reasonable and necessary, under the circumstances, to rid himself of it. The judgment must be reversed with costs, and a new trial ordered.

Arrest Without Warrant—Arrest by Officer.

BECKWITH v. PHILBY.

6 B. & C. 635 (Eng.). 1827.

This was an action for assaulting, beating, handcuffing, and imprisoning the plaintiff; and keeping and detaining him hand-

cuffed and imprisoned, without any reasonable or probable cause, for forty-eight hours, on a false and pretended charge of felony.

LORD TENTERDEN, C. J. I am of opinion that there is no ground for disturbing the verdict. * * * The only question of law in the case is, whether a constable having reasonable cause to suspect that a person has committed a felony, may detain such person until he can be brought before a justice of the peace to have his conduct investigated. There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities. Now in this case it is quite clear upon the evidence, and the jury have so found, that the conduct of the plaintiff had given the defendants just cause for suspecting that he either had committed, or was about to commit, a felony, and the jury having so found, I am of opinion that the action was not maintainable.

Arrest Without Warrant—Arrest by Private Person.

FIRESTONE v. RICE AND FENN.

71 Mich. 377, 38 N. W. 885. 1888.

MORSE, J. This suit was brought to recover damages for false imprisonment and assault and battery upon the plaintiff, alleged to have taken place on the night of August 6, 1885. Rice at the time was sheriff of Allegan county, and Fenn was night-watch of the village of Allegan. Upon the trial it appeared that Fenn was requested by the sheriff to aid him in the arrest, and did nothing except as ordered by the sheriff. The chief indignity complained of was the handcuffing of the plaintiff. Fenn put the handcuffs upon him by direction of the sheriff, who had in his charge at the time one Zeigler, who was arrested at the same time and place as the plaintiff.

The court instructed the jury that if Fenn knew that Rice was sheriff, and acted in obedience to his orders, in what he did touching the arrest, he would be justified in so doing, even though the acts of Rice were without authority, and their verdict, as to Fenn, should be no cause of action. "Under the laws of this State, a private citizen is bound, upon the order of the sheriff, to assist in the arrest, and he is not authorized to wait to ascertain the authority of the officer before acting; and unless his act in itself is in some way wanton, and beyond what he is required to do, and thereby a trespass is committed, he will not be liable, and for that reason I give you this request." The jury rendered a verdict in favor of both defendants.

The plaintiff alleges error in the charge of the court as above given. There was no error in this direction. It is admitted that Fenn did nothing in wantonness or malice. He went to the house of Zeigler, where the arrest was made, at the request of the sheriff, and while there, under his direction, placed handcuffs upon plaintiff, and rode beside him in a buggy to Allegan. The court would have been warranted in directing a verdict in Fenn's favor.

The sheriff is authorized to call upon citizens to aid him in apprehending or securing any person for felony or breach of the peace (How. Stat. § 591); and if any person so required to assist the sheriff neglect or refuse to do so, he is liable to punishment by fine or imprisonment (How. Stat. § 9250). We do not think that a man called upon by the sheriff is required, at his peril, to ascertain whether the sheriff has a proper warrant, or whether the offense charged against the person to be arrested is a felony, or that he refuse to act until he is satisfied that the sheriff is acting legally, or within the scope of his office, in a criminal case. If he were allowed to do this, the object of the law would be defeated, and the statute rendered nugatory in many cases.

There is often no time for inquiry, as action must be immediate. The necessity of the case will not permit the person thus summoned to stop to examine papers, or take counsel as to legality of the process in the officer's hands, or to inquire whether any process is necessary in the particular case where his aid is required.

Therefore the person who responds to the call of one whom he knows to be an officer is protected by the call from being sued for rendering the requisite assistance. The officer may not be acting legally, and therefore a trespasser; but the person assisting him, at his request or command, and who relies upon his official character and call, is protected by the law, and must necessarily be, against suits for trespass and false imprisonment, if in his acts he confines himself to the order and direction of the sheriff.

Judicial Process.

CAMPBELL v. SHERMAN.

35 Wis. 103. 1874.

[Action against a sheriff for attachment of the plaintiff's steamboat on Lake Michigan, for a debt due for seaman's wages. The writ was issued under Wisconsin Laws, 1869, ch. 184, giving a lien upon vessels for maritime debts. It appeared, however, that the law was unconstitutional, since only the Federal Government has admiralty jurisdiction over maritime liens. The question is whether the sheriff is liable.]

COLE, J. [After deciding that the State court which issued the warrant directing the sheriff to seize the vessel acted without jurisdiction, continues:] This being the case, the further question arises, Did the warrant thus issued in a cause over which that court had no jurisdiction, afford any protection to the officer for acts done in its execution? The counsel for the defendant contends that it would protect the officer, and that, if fair and regular on its face, he had no right and it was not his duty to inquire whether the court which issued it had jurisdiction of the cause.

Where the subject-matter of the suit is within the jurisdiction of the court, yet jurisdiction in the particular case is wanting, there is certainly reason and authority for holding that an officer who executes a process fair on its face, shall be protected. But a clear distinction exists between that case and a proceeding in which the process itself shows that the court has exceeded its jurisdiction. The rule is stated by Mr. Justice Smith in Bagnall v. Ableman, 4 Wis. 163, in the

following language: "When the process is fair on its face, and issued by a court or magistrate of competent jurisdiction, it is a protection to the officer. But if it be not fair and regular on its face, or its recitals or commands show a want or excess of jurisdiction in the court or magistrate issuing it, the officer is not protected in its execution." The form of the warrant issued in the present case is not set forth in the answer. But it undoubtedly was such a process as the clerk was required to issue upon the filing of the complaint, and it would show upon its face that it was issued in a proceeding instituted under the provisions of ch. 184. It would command the officer to attach and seize the steamer Ida Campbell, her tackle, apparel and furniture, if found within his county, and safely keep the same to answer all such liens as should be established against it in favor of the plaintiff in the cause. It would properly contain recitals showing that a complaint had been filed with the clerk, and state the nature and amount of the demand for which a lien was claimed against the vessel. We must presume from the matters stated in the answer, that such was the form of the warrant under which the officer acted; and furthermore a process setting forth these facts would be required by the law under which the proceeding was taken. And it is very apparent that such a warrant would show upon its face the nature of the proceeding, and that the suit was instituted to enforce a maritime lien.

In other words, it would show that the circuit court had no jurisdiction of the subject-matter of the action, and no power to hear and determine it. And we understand the rule to be, that where the process does show a want of jurisdiction in the court of the subject-matter of the action, it is void, and does not protect the officer. In this all the cases agree.

But it is said that this rule imposed upon the officer in the present case the duty of determining, in advance of any decision of the courts of this State, the validity of an act of the legislature. How can it be expected, it is asked, that a mere ministerial officer could decide such a question, and thus find out that his process was void for want of jurisdiction in the court which issued it? The maxim, ignorantia juris non excusat—ignorance of the law, which every man is presumed to know, does not afford excuse—in its application to human affairs, frequently

operates harshly; and yet it is manifest that if ignorance of the law were a ground of exemption, the administration of justice would be arrested, and society could not exist. For in every case ignorance of the law would be alleged. And consequently the answer must be given in this case, that the ignorance of the officer is of the law, and the rule is almost without exception, that this does not excuse.

It may devolve upon the officer a vast responsibility in some cases, to say that he must notice at his peril that an act of the legislature attempting to confer jurisdiction upon the courts is unconstitutional. But if the officer does not wish to assume all the hazard which such a rule of law imposes on him, he must require a bond of indemnity from the party for whom he is acting. It is further said that it was the duty of the officer to obey the mandate of the warrant and seize the identical steamboat which he did attach, and that he had no alternative but to obey. If the act which the writ commanded him to do was a trespass, he was not required to perform it. Nor would he be liable in that case to the plaintiff for refusing to execute a process void for want of jurisdiction.

Judicial Process—Entry Into a Man's Dwelling.

SWAIN v. MIZNER.

8 Gray 182 (Mass.). 1857.

Action for tort for breaking and entering the plaintiff's dwelling house.

MERRICK, J. That an officer cannot break the outer door of a dwelling house to make an attachment of the owner's goods, or to arrest the person of the debtor, or to execute civil process generally, is a doctrine as well established as any in the books; and has been distinctly recognized as the law of this commonwealth. Semayne v. Gresham, Yelv. (Amer. ed.) 29 and note 1; Oystead v. Shed, 13 Mass. 520; Ilsley v. Nichols, 12 Pick. 270. This is not controverted by the defendant; nor does he place his defense upon anything in opposition to this principle; but solely upon a denial of the fact that the door, which was broken by him in order to make the attachment which con-

stitutes the grievance complained of, was the outer door of the plaintiff's dwelling house.

But upon the facts disclosed in the bill of exceptions, we think that the portion of the building occupied by the plaintiff, distinct from the hall, entry and stairway leading to it, did constitute what must be considered in law his dwelling house. The whole structure appears never to have been designed as a tenement for a single family, but was so constructed as to afford separate and distinct habitations for several persons. Thus the plaintiff occupied all the rooms on one floor of the building, and the hall or entry through which he passed to reach either of the doors opening into any of the apartments occupied by him was used as a common passage way for all the tenants of the several portions of it.

It would seem to make no difference whatever may be the character or peculiarity of the common passage by which access to a dwelling house is attained; whether it is a public or private way; or whether it leads from one street to another, or only into a place or court to which there is but a single entrance; or whether it is an open street, or a way inclosed by buildings and covered with a roof. In the present instance, the hall, entry and stairway served as a common and public passage way for many occupants of entirely distinct habitations. All the right, to which the plaintiff or any other of the tenants of the different parts of the building in this common passage way was entitled, was the right of using it for that purpose in the enjoyment of the tenements which they severally possessed.

The apartments occupied by the plaintiff constituted, in and of themselves, a complete habitation for himself and his family. He had the sole and exclusive use and possession of them, as completely as if they stood separate and apart from everything else, and were in any other distinct structure. The privilege which the law allows to a man's habitation clearly ought to attach to apartments so situated. It arises from the great regard which the law has for every man's safety and quiet; and therefore it protects him from those inconveniences which must necessarily attend an unlimited power in the sheriff and his officers in this respect. Bac. Ab. Sheriff, N. 3. And this reason shows that the principle of law which gives protection to

dwelling houses has no reference whatever to their quality, construction or magnitude, but is solely for the purpose of ensuring the quiet convenience and security of those who inhabit and dwell in them. Domestic security and peace would be equally disturbed by violence in breaking doors and forcing an entrance into a dwelling house, whether it should consist of the entire portions of a building, or of separate apartments within it.

CHAPTER VII.

TRESPASS AB INITIO.

MALCOM v. SPOOR.

12 Met. 279 (Mass.). 1847.

SHAW, C. J. This was an action of trespass, in which the plaintiff declared against the defendant for breaking and entering her house, &c. The defendant justified under a writ directed to him, as constable, and commanding him to attach the plaintiff's household furniture.

The case comes before us on exceptions, from which it appears that the defendant was a constable, and that he entered the plaintiff's house, having a writ against her, and attached her furniture; that he took with him into the house a man who was intoxicated, whom he made keeper of the attached furniture, and left in the house, in charge of the furniture, although the plaintiff objected to his remaining there as keeper, on account of his intoxication. * * *

The court of common pleas, in which the trial was had, instructed the jury, that if the defendant, under color of his process, took with him a grossly intoxicated and clearly unfit person into the plaintiff's house, and left him therein as keeper, this was such an abuse of his authority as made him a trespasser ab initio; and that the defendant was answerable for all the acts of such keeper, done in pursuance of previous concert between them, or by direction of the defendant. A verdict was returned for the plaintiff, and the question whether these instructions were right, has been submitted to us without argument.

It has been held as a rule of the common law, ever since The Six Carpenters' Case, 8 Co. 146, that where one is acting under an authority conferred by law, an abuse of his authority renders him a trespasser ab initio. Melville v. Brown, 15 Mass. 82. In the case before us, the defendant had authority by law to enter the plaintiff's house, to serve legal process; but placing

there an unfit and unsuitable person, to keep possession of the attached goods in his behalf until he could remove them, against the remonstrance of the plaintiff, was an abuse of his authority, which rendered him liable as a trespasser ab initio.

An officer cannot legally stay in another's building, to keep attached goods therein, nor authorize any other person to remain therein, as keeper, for a longer time than is reasonably necessary to enable him to remove the goods, unless he has the consent, express or implied, of the owner of the building, without rendering himself liable as a trespasser. See Rowley v. Rice, 11 Met. 337. Exceptions overruled.

ALLEN v. CROFOOT.

5 Wend. 506 (N. Y.). 1830.

SAVAGE, C. J. The plaintiff in error seeks to reverse the judgment in the common pleas on two grounds. * * *

It is also urged by the plaintiff in error that the court below erred in charging the jury that the action was sustainable, if they should find that the defendant entered the plaintiff's house fraudulently, to obtain improperly copies of papers in the absence of the plaintiff. It was decided in The Six Carpenters' Case, 4 Co. 290, that where an authority to enter upon the premises of another is given by law, and it is subsequently abused, the party becomes a trespasser ab initio; but where such authority or license is given by the party, and it is subsequently abused, the party guilty of the abuse may be punished, but he is not a trespasser; and the reason of the difference is said to be that in case of a license by law the subsequent tortious act shows quo animo he entered; and having entered with an intent to abuse the authority given by law, the entry is unlawful; but where the authority or license is given by the party, he cannot punish for that which was done by his own authority. Whether this is not a distinction without a difference of principle, it is not necessary to inquire. A better reason is given for it in Bac. Abr., tit. Trespass, B. Where the law has given an authority, it is reasonable that it should make void everything done by abuse of that authority, and leave the abuser as if he had done everything without authority. But where a man who

was under no necessity to give an authority does so, and the person receiving the authority abuses it, there is no reason why the law should interpose to make void everything done by such abuse, because it was the man's folly to trust another with an authority who was not fit to be trusted therewith. It is contended that the license, being obtained by fraud, was void. The defendant knocked at the door, and was told to walk in; he was found copying certain papers; but how he obtained them, on what representation, or from whom, the evidence does not disclose. One witness does indeed testify that he said he would not have got the copies, if he had not practiced a deception on the wife and brother-in-law of the plaintiff. If this declaration should be considered evidence of his having made improper representations to obtain the papers, then the question arises: does he thereby become a trespasser ab initio?

It has been decided that to enter a dwelling without license is in law a trespass, 12 Johns. 408, and that possession of property obtained fraudulently confers no title. Under such circumstances no change of property takes place, 15 Johns. 186; and it is argued that, as fraud vitiates everything into which it enters, a license to enter the house fraudulently obtained is void, and is no license. The principle of relation has never been applied to such a case, nor is it necessary for the purposes of justice to extend it further than to cases where the person enters under a license given him by law. In such cases, as the party injured had not the power to prevent the injury, it seems reasonable that he should be restored to all his remedies.

LEADING ILLUSTRATIVE CASES LAW OF TORTS

PART II

CONVERSION

CHAPTER I.

INTRODUCTION—DEFINITION.

Actions for Wrongful Taking of Personalty.

BURROUGHES v. BAYNE.

5 H. & N. 296 (Eng.). 1860.

[Action of trover to recover the value of a billiard table. One Filmer hired of the plaintiff the billiard table, which was delivered into the possession of Filmer. Subsequently a further agreement was made between the plaintiff and Filmer, which was endorsed on the original contract of hiring and executed by Filmer; but, apparently, this second agreement was not completed, and the precise nature of it does not appear. Filmer executed a bill of sale, including the billiard table, to the defendant, and delivered possession of the table to the defendant's agent. The plaintiff demanded the table of the defendant, who refused to deliver it over to the plaintiff, under circumstances stated in the opinion of Martin, B. There was a verdict for the plaintiff and a rule for a new trial was obtained on the ground that the verdict was against the evidence, and that there was no sufficient evidence of conversion.]

MARTIN, B. The question in this case was, whether there was evidence to go to the jury of a conversion; and we are all of opinion that there was. The case, as it seems to me, is of

considerable importance. There is no more common cause of action than where an owner of goods complains that another has wrongfully taken possession of them. The law has provided four forms of action applicable to such a state of things. First, the action of trespass, which appears more immediately directed to the taking of a man's property out of the possession of the owner; secondly, the action of replevin in respect of goods taken but restored to the owner by process of law. But at common law the more direct remedy for the recovery of possession, or damages, where a chattel was detained from the owner, was the action of detinue. There existed, however, an objection to that action, which was that the defendant was entitled to wage his law; and the consequence was that the defendant in an action of detinue, by himself swearing to the non-existence of the cause of action, could at once default the plaintiff. In consequence of this, the courts of law in very early times invented the action of trover.[1] They permitted the plaintiff to state that he lost goods which he never lost, and that the defendant found goods which he never found, and that the defendant converted the goods so found to his own use. The courts took upon themselves to prohibit the defendant from denying either the averment of the losing or the finding by the plaintiff; and thus they gave an action (a species of action on the case) in which the defendant could not wage his law. That, I believe, was the origin of the action of trover,—an action devised for the purpose of preventing the plaintiffs from being defeated by the wager of law. The origin of the action of indebitatus assumpsit was the same. For the purpose of preventing the wager of law in an action to recover a debt, the courts devised the action of indebitatus assumpsit, wherein it was alleged that the defendant was indebted to the plaintiff, and, being so indebted, he promised to pay the debt, but broke his promise. This was an action on the case, and wager of law could not be made. This, I believe, was the true origin of the action of trover, and, in my judgment, we ought to extend its operation to all cases where a right of action in detinue properly exists, and not throw difficulties in the way of a man's recovering where his goods are wrongfully detained. I myself have always understood that

[1] See criticism of this statement by Brett, J., in Hollins v. Fowler, L. R. 7 H. L. 757.

trover was the action whereby a person entitled to the possession of goods wrongfully detained from him was entitled by law to recover damages for their detention. I do not think there is any necessity to discuss the original meaning of the words "trover" or "conversion"; they are technical expressions used in an action given by the law to enable a man to recover damages for the unlawful detention of his property. I freely admit that the word "conversion" is an unfortunate expression. Undoubtedly in the great majority of cases where an action of trover is brought, no conversion in one sense has taken place; the goods are in the same state in which they always were; there is no actual conversion in the sense in which a person, not a lawyer, might possibly understand the term. In ordinary cases, the plaintiff's proof is much the same as would be required in an action of detinue. But the word "conversion" by a long course of practice, has acquired a technical meaning. It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them. In Wilbraham v. Snow, there is a note of Serjeant Williams, which, I apprehend, is as good an authority on this subject as exists. He says: "So where a carpenter, who worked in the king's yard, refused to go there any more, upon which the surveyor would not let him have his tools until the king's work was done, under a pretended usage to do so, a demand and refusal being proved, it was held by Holt, C. J., that the denial of goods to him who has a right to demand them is an actual conversion, and not evidence of it only; for what is a conversion but an assuming upon one's self the property in and right of disposing of another's goods? And whoever detains another man's goods from him without cause, takes upon himself the right of disposing of them." Now I adopt that as the true meaning of the word "conversion" in reference to this action, and the same rule has been laid down in modern times. There is a case, Fouldes v. Willoughby, which I have long considered, and often heard cited as laying down the true rule upon this subject. In that case a ferryman at Birkenhead had had some horses put on board his boat to bring to Liverpool; he turned them out, and the horses were left upon the road. An action of trover was brought, and the question was, whether or not trover lay for their value. The court were of opinion that it did not; and the distinction between the

action of trespass and trover was much discussed. Alderson, B., in delivering his judgment says: "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion, for this simple reason: that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times, and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion." I entirely accede to this view of the law, which is simple and of easy application.[1]

Apply it to this case. The facts were these: A person had hired a billiard table of the plaintiff, and then had executed a bill of sale to the defendant; and I own that I am not prepared to state that the taking possession under that bill of sale was not an act of conversion, for it seems to me it falls within what is stated by Alderson, B., that it is an act by which the defendant took possession of the chattel for the use of himself from a person who had no right to give it. I am by no means inclined to say that the simple taking possession by the defendant under the bill of sale was not a conversion of those goods. What further took place, however, is this: The plaintiff went to the defendant and showed him the document under which the billiard table was hired. Thereupon the defendant said he would give it up; but, on turning over the paper, he found something which was an incomplete contract for sale, and he then alleged that there was a sale, or that he supposed there was, and refused to give it up. He said, in effect, "You are not entitled to it," and he did not deliver it up. In the evening the plaintiff told the defendant that at twelve o'clock on the following day he should send for the table for the purpose of carrying it away. Accordingly the plaintiff did send, and could not get it, it being locked up. In the meantime the defendant had found that he was in error, and had directed the man in possession to give up the billiard table. If the key could have been obtained, it is suggested that it would have been given up. The plaintiff, however, went to get the billiard table in pursuance of his notice; and I think it was the duty of the defendant to be

[1] See opinion of Brett, J., in Hollins v. Fowler, L. R. 7 H. L. 757, discussing the case of Burroughes v. Bayne, and the opinions of Baron Martin and other judges therein.

ready to give it to him when he came for it. The consequence was that the billiard table was distrained by the landlord for rent. If it had been delivered up to the plaintiff on the day appointed, when he was entitled to have it, this would not have happened. I think that this was evidence to go to the jury of a conversion. I myself should have directed the jury to find a verdict for the plaintiff, if they believed the evidence adduced on his behalf. For these reasons, I think the rule ought to be discharged. Rule discharged.

Replevin.

FOULDES v. WILLOUGHBY.

8 M. & W. 540 (Eng.). 1841.

[Trover for the value of two horses. The defendant was the manager of a ferry on which the plaintiff embarked with two horses. There was evidence that the plaintiff behaved improperly and that the defendant demanded that the plaintiff leave the ferry with his horses; upon the plaintiff's failure to do so, the defendant put the horses on shore on the landing slip, from which they were driven, and turned loose in the high road. They afterwards were sold by a hotel keeper, at auction, to pay for their keep. The court instructed the jury that the defendant's act of taking the horses from the plaintiff and putting them off the ferry was a conversion, and that the plaintiff was entitled to recover unless the jury found that the defendant was justified in so doing by the plaintiff's misconduct. There was a verdict for the plaintiff for the value of the horses, and a rule obtained to show cause why the verdict should not be set aside on the ground that the instructions were erroneous.]

LORD ABINGER, C. B. This is a motion to set aside the verdict on the ground of an alleged misdirection; and I cannot help thinking that if the learned judge who tried the cause had referred to the long and frequent distinctions which have been taken between such a simple asportation as will support an action of trespass, and those circumstances which are requisite to establish a conversion, he would not have so directed the jury. It is a proposition familiar to all lawyers, that a simple asporta-

tion of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. I had thought that the matter had been fully discussed, and this distinction established, by the numerous cases which have occurred on this subject; but, according to the argument put forward by the plaintiff's counsel today,—a bare asportation is a sufficient foundation to support an action of trover. I entirely dissent from this argument; and therefore I think that the learned judge was wrong, in telling the jury that the simple fact of putting these horses on shore by the defendant amounted to a conversion of them to his own use. In my opinion, he should have added to his direction, that it was for them to consider what was the intention of the defendant in so doing. If the object, and whether rightly or wrongfully entertained is immaterial, simply was to induce the plaintiff to go on shore himself, and the defendant, in furtherance of that object, did the act in question, it was not exercising over the horses any right inconsistent with, or adverse to, the rights which the plaintiff had in them. Suppose, instead of the horses, the defendant had put the plaintiff himself on shore, and, on being put on shore, the plaintiff had refused to take his horses with him, and the defendant had said he would take them to the other side of the water, and had done so, would that be a conversion? That would be a much more colorable case of a conversion than the present, because, by separating the man from his property, it might, with some appearance of fairness, be said the party was carrying away the horses without any justifiable reason for so doing. Then, having conveyed them across the water, and finding neither the owner or any one else to receive them, what is he to do with them? Suppose, under those circumstances, the defendant lands them and leaves them on shore, would that amount to a conversion? The argument of the plaintiff's counsel in this case must go the length of saying that it would. Then, suppose the reply to be that those circumstances would amount to a conversion, I ask, at what period of time did the conversion take place? Suppose the plaintiff had immediately followed his horses when they were put on shore, and resumed possession of them, would there be a conversion of them in that case? I apprehend, clearly not. It has been argued that the mere touching and taking them by

the bridle would constitute a conversion, but surely that cannot be; if the plaintiff had immediately gone on shore and taken possession of them, there could be no conversion. Then the question whether this were a conversion or not, cannot depend on the subsequent conduct of the plaintiff in following the horses on shore. Would any man say, that if the facts of this case were that the plaintiff and defendant had had a controversy as to whether the horses should remain in the boat, and the defendant had said, "If you will not put them on shore, I will do it for you," and, in pursuance of that threat, he had taken hold of one of the horses to go ashore with it, an action of trover could be sustained against him? There might, perhaps, in such a case, be ground for maintaining an action of trespass, because the defendant may have had no right to meddle with the horses at all; but it is clear that he did not do so for the purpose of taking them away from the plaintiff, or of exercising any right over them, either for himself, or for any other person. The case which has been cited from Strange's Reports of Bushell v. Miller seems fully in point. There the plaintiff and defendant, who were porters, had each a stand on the Custom-House Quay. The plaintiff placed goods belonging to a third party in such a manner that the defendant could not get to his chest without removing them, which he accordingly did, and forgot to replace them, and the goods were subsequently lost. Now suppose trespass to have been brought for that asportation, the defendant, in order to justify the trespass, would plead that he removed the parcels, as he lawfully might, for the purpose of coming at his own goods; and the court there said that, whatever ground there might be for an action of trespass in not putting the package back in its original place, there was none for trover, inasmuch as the object of the party in removing it was one wholly collateral to any use of the property, and not at all to disturb the plaintiff's rights in or dominion over it. Again, suppose a man puts goods on board a boat, which the master thinks are too heavy for it, and refuses to carry them, on the ground that it might be dangerous to his vessel to do so, and the owner of the goods says, "If you put my goods on shore, I will go with them," and he does so; would that amount to a conversion in the master of the vessel, even assuming his judgment as to the weight of the goods to be quite erroneous, and that there really would be no

danger whatever in taking them? In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them, by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed or consumed, to the prejudice of the lawful owner. As an instance of the latter branch of this definition, suppose, in the present case, the defendant had thrown the horses into the water, whereby they were drowned, that would have amounted to an actual conversion; or as in the case cited in the course of the argument, of a person throwing a piece of paper into the water; for, in these cases, the chattel is changed in quality, or destroyed altogether. But it has never yet been held that the single act of removal of a chattel, independent of any claim over it, either in favor of the party himself or any one else, amounts to a conversion of the chattel. In the present case, therefore, the simple removal of these horses by the defendant, for a purpose wholly unconnected with any the least denial of the right of the plaintiff to the possession and enjoyment of them, is no conversion of the horses, and consequently the rule for a new trial ought to be made absolute.

With respect to the amount of damage, it was altogether a question for the jury. I am not at all prepared to say, that if the jury were satisfied that there had been a conversion in this case, they would be doing wrong in giving damages to the full value of the horses. I do not at all rest my judgment on that point, but put it aside entirely. If the judge had told the jury that there was evidence in the case from whence they might infer that a conversion of these horses had taken place at some time, it would have been different; but his telling them that the simple act of putting them on shore amounted to a conversion, I think, was a misdirection on which the defendant is entitled to a new trial.

ALDERSON, ROLFE and GURNEY, BB., delivered concurring opinions. Rule absolute.

CHAPTER II.

NATURE OF CONVERSION.

Intent.

GURLEY v. ARMSTEAD.

148 Mass. 267. 1889.

Action of tort for conversion of certain articles of personal property. The case was submitted on agreed statement of facts and after judgment for the defendant in the Trial Court an appeal was taken. The facts are stated in the opinion.

DEVENS, J. The defendant, who was a job teamster, removed the goods alleged to have been by him converted from a room in the dwelling house of one Whittier to the store of one Davis, and there delivered them to Whittier, by whose direction he had acted. Although the goods were in the house of Whittier, they were in a room hired by the plaintiff from him. The contract between them was one for rent, and not for storage, Whittier reserving no control over the room. It was, however, neither locked nor fastened, although no goods were in it except those of the plaintiff. In all that he did the defendant acted in good faith, without any intention of depriving the rightful owner of her property, and in ignorance of the fact that the plaintiff was such owner, neither asserting title in himself nor denying title to any other, nor exercising any act of ownership except by the removal above stated.

The legal possession of the goods was, under these circumstances, undoubtedly in the plaintiff, and as they were in the room hired by her, the actual possession was also hers. The apparent control of them was, however, in Whittier, as they were in his house, and he had further the present capacity to take actual physical possession, as the room in which they were was neither locked nor fastened.

It is conceded that whoever receives goods from one in actual,

although illegal, possession thereof, and restores the goods to such person, is not liable for a conversion by reason of having transported them. Strickland v. Barrett, 20 Pick. 415; Leonard v. Tidd, 3 Met. 6. And this would be so apparently, even if the goods thus received were restored to the wrongful possessor after notice of the claim of the true owner. Loring v. Mulcahy, 3 Allen, 575; Metcalf v. McLaughlin, 122 Mass. 84.

Upon the precise question raised, we have found no direct authority, nor was any cited in the argument; but the principle on which the decisions above cited rest is not unreasonably extended when it is applied to the circumstances of the case at bar. The act of removing goods by direction of the wrongful possessor of them is an act in derogation of the title of the rightful owner; but the party doing this honestly is protected because from such actual possession he is justified in believing the possessor to be the true owner. He does no more than such possessor might himself have done by virtue of his wrongful possession.

The defendant was a job teamster, and thus in a small way a common carrier of such wares and merchandise as could appropriately be transported in his team or wagon. He exercised an employment of such a character that he could not legally refuse to transport property such as he usually carried, which was tendered to him at a suitable time and place with the offer of a reasonable compensation. If he holds himself out as a common carrier, he must exercise his calling upon proper request and under proper circumstances. Buckland v. Adams Express Co., 97 Mass. 124; Judson v. Western Railroad, 6 Allen, 486. His means of ascertaining the true title of the freight confided to him are of necessity limited. He must judge of this as it is fairly made to appear. If Whittier had actually gone into the room, as he might readily have done, and taken physical possession of the goods, the defendant upon well established authority would have been justified in obeying the order and transporting the goods to Whittier at another place; and should he not be the less justified where Whittier, in apparent control of the goods in his own house, and capable of immediately taking them into his actual custody by entering the room through the unlocked door, has directed the removal?

If a person standing near and in sight of a bale of goods lying

on the sidewalk belonging to another, and thus in the legal possession of such other, is able at once to possess himself of it actually, although illegally, and directs a carrier to remove it and deliver it to him at another place, compliance with this order in good faith cannot be treated as a conversion; and apparent control, accompanied with the then present capacity of investing himself with actual physical possession, must be equivalent to illegal possession in protecting a carrier who obeys the order of one having such control.

Judgment for the defendant.

Demand and Refusal.

CRAMPTON, ASSIGNEE v. VALIDO MARBLE COMPANY.

60 Vt. 291. 1888.

[Action of trespass on the case and trover, by the assignee of the West Rutland Marble Company, to recover the value of a pair of oxen, one dynamo and some marble. The West Rutland Company was indebted to the defendant company in the sum of $1630, and while insolvent, the West Rutland Company conveyed to the defendant the above mentioned merchandise, in payment, or part payment, of the indebtedness; subsequently the West Rutland Company was petitioned into insolvency; the plaintiff was duly appointed assignee; and all the property of the insolvent debtor was duly assigned to the plaintiff as such assignee. These proceedings were had under the insolvency law of the State of Vermont. All of the goods were delivered to the defendant company, which sold the marble and the oxen; the dynamo remained in the possession of the defendant, until after the bringing of the suit. The dynamo, oxen, and some of the marble were delivered by the West Rutland Company to the defendant company in the State of Vermont, and the rest of the marble was delivered in the State of New York. The defendant admitted that the West Rutland Company was insolvent, and that the defendant's officers had cause to believe that the West Rutland Company was insolvent; there was no dispute as to the conveyance of the goods by the West Rutland Company to the defendant company, for the purposes above mentioned. The defendant claimed that

the insolvency laws of Vermont did not apply to the property conveyed in the State of New York, and further contended that the plaintiff had not proved any demand by him and refusal by the defendant to return the property, and that such evidence was necessary in order for the plaintiff to maintain his action. There was a verdict for the plaintiff.]

VEAZEY, J. * * * [The court discusses the question of whether the insolvency laws of Vermont applied to the conveyance of the marble in the State of New York, holding that such a conveyance was governed by the insolvent statutes of Vermont.]

It is further claimed that the plaintiff cannot recover because no sufficient demand for the return of the property was shown. We think no demand was necessary to entitle the plaintiff to recover.

The contract by which the defendant obtained the property was by the statute void. The defendant appropriated the property to its use by a sale and otherwise. There was concededly an actual conversion and no power to restore. The harsh rule was early established in this State, unlike the rule in some other States, that where one purchases personal property of a person in possession of it, but who is not the true owner and has no right to sell it, and the purchaser takes possession, claiming title to it as owner, and puts it to use, this is an actual conversion and makes him liable in trover to the owner, without any demand or notice, though he purchased in good faith of one whom he supposed to be the owner and entitled to sell it. Riford v. Montgomery, 7 Vt. 411.

The case at bar is stronger because here the vendor not only had no right to sell the property to the vendee, to be applied on the debt, thereby giving a preference, but the vendee was chargeable with knowledge of that fact. There is no necessity of proof of a demand and refusal for the purpose of establishing a conversion, when the conversion is otherwise established. It is only evidence of a conversion where the party might have delivered the property if he would. Roberts Dig., p. 709. Defendant's counsel cites Schuman, Assignee, v. Fleckenstein, 15 N. B. R. 224. That action was brought by the assignee of a bankrupt under the U. S. Bankrupt Act (§ 5128 of the U. S. R. S.) to recover from the defendant the sum of $311, the alleged value of cer-

tain property transferred by the bankrupt to the defendant within two months prior to the filing of the petition against him in bankruptcy, contrary to the provision of said action, which is in substance and almost in terms the same as § 1860 of our Revised Laws. The defendant demurred and for causes of demurrer assigned that the complaint, a code proceeding, did not allege a demand and refusal of the property, or any fact showing its conversion by the defendant.

The court sustained the demurrer, holding that an action to recover the value of property can only be maintained when the property itself has been actually or constructively converted to the use of the defendant, and the complaint must therefore allege a conversion in terms or its legal equivalent, a demand and refusal. Under that decision either is sufficient.

Here we have a conversion in fact. Speaking of the action of trover, Chitty (Chit. Pl., page 170) puts it in the same way: "A demand and refusal are necessary in all cases when the defendant became in the first instance lawfully possessed of the goods; and the plaintiff is not prepared to prove some distinct actual conversion." So in Triscony v. Orr, 49 Cal. 617, it was held that no distinct and actual conversion being shown, the plaintiff must allege and prove a demand and refusal before he can recover. To the same effect see also Brooks v. McCraken, 10 N. B. R. 466. The proof of demand and refusal constitutes evidence of conversion, or constructive conversion as sometimes called, and is the equivalent of proof of actual conversion, either of which is sufficient to entitle the plaintiff to recover, where the other elements are established. See Tapley v. Forbes, 84 Mass. 20; Larkin v. Hapgood, 56 Vt. 597.

We think there was no error in the instructions to the jury as to the rule of damages. It was the value of the property at the time the defendant took it. If the clause that the plaintiff was entitled to recover the value of the dynamo as it stood in the mill was fairly and clearly referable to the damage done to the insolvent's other property not taken by the defendant, it would doubtless be error; but we do not so construe it or think it was so understood by the jury. But we do think that the jury by inadvertence included in the special verdict as to the dynamo, the three electric lamps and the cost of setting them up. The correspondence in the figures makes this very apparent. The amount

of this with interest was $171.47. This the plaintiff offers to remit, and asks leave to file a remittitur. This, we think, should be allowed, but the defendant should have costs in this court.

Judgment is rendered for the plaintiff for the amount of the judgment below less said sum remitted, with costs, less the defendant's costs in this court.

Vesting of Title of Property Converted.

MILLER v. HYDE.

161 Mass. 472, 37 N. E. 760. 1894.

[Action of replevin of a horse. The plaintiff was administratrix of her husband, who had purchased the horse, through his agent, Bryden. After the purchase, Bryden kept the horse at Hartford, Connecticut, and refused to deliver it to the plaintiff, as administratrix of her husband, claiming to own a half interest in it. Bryden subsequently sold and delivered the horse to Davenport and Hyde, residents of Connecticut. Ancillary administration having been obtained in Connecticut, the plaintiff brought an action of trover in that State against Bryden, Davenport and Hyde, wherein she obtained judgment against Bryden only. In this suit the plaintiff attached the horse on mesne process, and after judgment, execution issued and was delivered to an officer who advertised the horse for sale on the execution, after making an ineffectual demand on Bryden for satisfaction of the judgment. Before the sale took place, the horse was replevied by Davenport, who subsequently entrusted the horse to the defendant; the latter having brought the horse to Massachusetts, the present action was brought. There was a judgment for the defendant on the foregoing agreed facts, and the plaintiff appealed.]

BARKER, J. The plaintiff may maintain replevin if she is the owner of the horse, and if she is not estopped from asserting her ownership against the defendant. As administratrix of her husband's estate, she was the owner when she brought trover in Connecticut against Bryden, the bailee, who had wrongfully usurped dominion, and sold and delivered the horse to Davenport. As the horse was in Connecticut and the action of trover

was in the courts of that State, the effect of the suit upon her title would be determined by the law of the forum. But as the law of Connecticut is not stated as an agreed fact, we must apply our own. Whether a plaintiff's title to the chattel is transferred upon the entry in his favor of judgment in trover has not been decided by this court. Assuming that in early times title to the chattel was transferred to the defendant upon the entry of judgment for the plaintiff in trover, at present a different doctrine is generally applied, and it is now commonly held that title is not transferred by the entry of judgment, but remains in the plaintiff until he has received actual satisfaction; see Atwater v. Tupper, 45 Conn. 144; Turner v. Brock, 6 Heisk. 50; Lovejoy v. Murray, 3 Wall. 1; Ex parte Drake, 5 Ch. D. 866; Brinsmead v. Harrison, L. R. 7 C. P. 547; 1 Greenl. Ev., § 533 and note; and the law has been commonly so administered by our own trial courts. We think this doctrine better calculated to do justice, and see no reason why we should not hold it to be law.

Whenever the title passes, as there has been no sale or gift, and no title by prescription or by possession taken upon abandonment by the true owner, the transfer is made by his inferred election to recognize as an absolute ownership the qualified dominion wrongfully assumed by the defendant. The true owner makes no release in terms and no election in terms to relinquish his title; but the election is inferred by the law, to prevent injustice. Formerly this election was inferred when judgment for the plaintiff was entered, because his damages, measured by the value of the chattel and interest, were then authoritatively assessed, and the judgment brought to his aid the power of the court to enforce its collection out of the wrongdoer's estate or by taking his person; and this was deemed enough to insure actual satisfaction. If so, it was just to infer that when he accepted these rights he elected to relinquish to the wrongdoer the full ownership of the chattel. An election was not inferred when the suit was commenced, although the plaintiff then alleged that the defendant had converted the chattel, and although the writ might contain a capias, because, owing to the uncertainties attendant upon the pursuit of remedies by action, it was not just to infer such an election while ultimate satisfaction for the wrong was but problematical. Forms of action are a means of administering justice, rather than an end in themselves. When it is seen that the

practical result of a form of action is a failure of justice, the courts will make such changes as are necessary to do justice. If the entry of judgment in trover usually gave the judgment creditor but an empty right, it was not just to infer that upon acquiring such a right he relinquished the ownership of the chattel, and the rule that required the inference to be then drawn was properly changed. The ground for inferring such an election was that upon the entry of judgment he acquired an effectual right in lieu of his property, and the doctrine that without some actual satisfaction the inference of an election would not be drawn has been shown by experience to be necessary to the administration of justice, and has been generally acted upon, and the modern rule adopted that the plaintiff's title is not transferred by the entry of judgment, but is transferred by actual satisfaction. Trover is but a tentative attempt to obtain justice for a wrong, and until pursued so far that it has given actual satisfaction ought not to bar the plaintiff from asserting his title. The present doctrine is consistent with the general principle stated by Lord Ellenborough in Drake v. Mitchell, 3 East, 251, and quoted in Vanuxem v. Burr, 151 Mass. 386, 389, as approved in Lord v. Bigelow, 124 Mass. 185, that "a judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the party." Whether the holder of an unsatisfied judgment in trover can without a fresh taking maintain replevin against the same defendant, or is restricted to one action against the same person for a single tort, we do not now decide. See Bennett v. Hood, 1 Allen, 47; Trask v. Hartford & New Haven Railroad, 2 Allen, 331; Bliss v. New York Central & Hudson River Railroad, 160 Mass. 447. If he is so restricted, it is not because the ownership of the chattel has been transferred.

But the present plaintiff has done more than to take judgment in trover. In her action of trover she caused the horse to be attached upon mesne process, and since obtaining judgment she has caused the horse to be seized as property of Bryden in execution on the judgment as his property, and to be kept and offered for sale on the execution until, as it was about to be so sold, it was replevied by Davenport from the officer in a suit between them which is still pending in Connecticut. That suit is not a bar to this action, because it is not between the same

parties. White v. Dolliver, 113 Mass. 400. Newell v. Newton, 10 Pick. 470. But we must still inquire whether, assuming that the plaintiff's property in the horse was not transferred by her judgment in trover, it was transferred by that judgment taken in connection with the facts of the attachment and levy, and also whether she is estopped by the attachment and the levy from asserting her title in this action.

In the first place, the doctrine that a mortgagee of personalty who attaches the mortgaged goods on a writ against the mortgagor cannot afterwards enforce his mortgage, is not in point. The mortgagee is not the owner, but has merely a lien, and may well be held to relinquish that lien when by the attachment he establishes another. But if the plaintiff has actual ownership, and thus the full right to do with his own property as he may choose, merely procuring it to be attached on mesne process or seized on execution as the property of another does not work a change of ownership. The owner does not sell or give away his goods. In cases which are likely to occasion such conduct, there usually is, as in the present case, a disputed title; and it is with the hope of avoiding litigation over it that the real owner consents that the chattel shall for a special purpose only be treated as the property of another. This is "consistent with an intenion ultimately to assert title should circumstances render it desirable for him so to do"; and he may well wait to see the issue, which may be such as to avoid the litigation of the question of title. See Mackay v. Holland, 4 Met. 69, 74; Dewey v. Field, 4 Met. 381, 384; Johns v. Church, 12 Pick. 557; Bursley v. Hamilton, 15 Pick. 40, 43; Edmunds v. Hill, 133 Mass. 445, 446. Nor is there any good reason why such a use of his own property by a plaintiff in trover should be held to devest him of his ownership when it would not have that effect in other forms of action. In trover he is in legal effect asserting by his suit that the title is and will remain in himself until he receives satisfaction on a judgment, and his subjection of the chattel to attachment or to seizure on execution is simply a use which he chooses to make of his own property which does not devest him of title or hamper him in the subsequent assertion of his ownership except by the rules of estoppel. * * *

In the present case, the natural construction to be put upon the plaintiff's conduct in attaching and beginning a levy upon

her own horse in a suit asserting her ownership is, that, while she contended that in fact the horse was her own, she consented that, if litigation as to the true state of title could be avoided by so selling the horse that the proceeds of the sale should be applied upon her claim for damages, she would in that event no longer assert her paramount title. Her implied offer not having been accepted, and Davenport having rendered impossible the accomplishment of her plan to avoid further litigation, she could thereupon say that all which had gone before was provisional upon the completion of the levy, and could enforce her right of property by any proper action against Davenport, or any one who might thereafter take wrongful possession of her horse, unless she was barred by the rules of estoppel.

Upon the question of estoppel, it is material to the decision of the present case to consider only whether she is estopped as to the present defendant or his principal Davenport. Whether she has rendered Bryden, or the officer who made the attachment or the levy in the Bryden suit, liable to costs, expenses, or chance of loss, is not material upon the question whether she is barred by the doctrines of estoppel from maintaining the present action. She is now prosecuting one of several successive wrongdoers for a fresh interference with the possession of her property; and neither the present defendant, Hyde, nor Davenport, for whom he claims to be acting as agent, has done or suffered anything, or been put to any liability by reason of which the plaintiff should be estopped from asserting her title. Upon the facts, Davenport in taking the horse in replevin did not rely upon the attachment or levy, but acted in denial of their validity; and Hyde is not shown to have been influenced by them in consenting to become Davenport's agent in keeping the horse, or in any manner. Neither Hyde nor Davenport is shown to have changed his position or course of conduct relying upon the plaintiff's action in causing the attachment or the levy, and the plaintiff is not estopped by it from maintaining the present action. In the opinion of a majority of the court, the result must be,

Judgment set aside, and judgment for the plaintiff ordered.

HOLMES, J., delivered a dissenting opinion, holding that the rule of the common law was that by prosecuting an action of trover to judgment, the plaintiff had thereby made an election

to treat the goods as the defendant's, and that accordingly the plaintiff was barred in this action of replevin.

KNOWLTON. J., also delivered a dissenting opinion, in which Mr. Chief Justice Field concurred, holding that judgment should be given for the defendant, on the ground that "when one undertakes to collect the value of his property by making an attachment to secure the judgment which he may obtain, and then prosecutes his claim to judgment, he has done that which affects the rights of the other party far more than the mere recovery of a judgment on an unsecured claim. But, however that may be, when after judgment the plaintiff proceeds to obtain satisfaction by a levy on the defendant's property, and much more when he levies on the property for the value of which he obtained judgment, and advertises it for sale as the property of the defendant, he should be held to have fixed his rights and the rights of the other party in regard to the title beyond his power to change them."

Qualified Refusal.

SARGENT v. GILE.

8 N. H. 325. 1836.

[Trover for the conversion of certain household furniture. Plaintiff delivered the furniture of one Wilson, under a contract providing that if Wilson paid for the furniture within six months, he was to have it at cost; otherwise he was to pay 25 per cent of the cost for the use of the goods. Three days after the delivery of the furniture by the plaintiff to Wilson, the latter sold the furniture to the defendant, the latter supposing that Wilson was the absolute owner of it; on the same day, the plaintiff demanded the furniture of the defendant who refused to deliver it to the plaintiff, whereupon the plaintiff brought the present action. There was a verdict for the plaintiff, by direction of the Court, subject to be set aside if, upon the facts stated, the action could not be maintained.]

PARKER, J. In Vincent v. Pardon Cornell, 13 Pick. 294, the plaintiff, in February, exchanged oxen with William Cornell, under an agreement that he should pay the plaintiff a certain

sum by the 7th of May following; and it was agreed, in order to secure the plaintiff, that Cornell should keep the oxen until the 7th of May, and return them at that time, unless the sum was paid; but if the money was paid, the plaintiff was to release his right to them.

Before the time, William Cornell sold them to the defendant, and the defendant to one Tripp, and after the 7th of May the plaintiff demanded them of the defendant, and brought trover. The court held that the agreement amounted to a conditional sale—that William Cornell had, therefore, a right to dispose of the possession, with his right, such as is was—that the plaintiff had no possession, or right of possession, and that the taking by the defendant, and his sale to Tripp, did not therefore amount to a conversion. Mr. Justice Wilde said it had been argued, that the sale by William Cornell was such a breach of trust as to terminate the bailment, and to restore to the plaintiff a right of possession, but the argument could not be sustained.

Were we to adopt all the conclusions in that case, this action must fail. But in Sanborn v. Colman, 6 N. H. Rep. 14, where the plaintiff, being the owner of a mare, had let her, on the 1st of February, 1830, for hire, to Brown, for four weeks, and Brown sold her within five days afterwards, to the defendant, and the plaintiff demanded her, within the four weeks, of the defendant, who refused to deliver her,—this court held that the sale of the mare put an end to the contract between Brown and the plaintiff, and that the plaintiff might maintain trover.

We have re-considered that case, and are satisfied with the decision. Unless, therefore, the fact, that by the original contract between these plaintiffs and Wilson, the latter had a right to pay for the furniture within the six months, changes the nature of the case, we must hold that this action is well sustained, and we are all of opinion that this does not affect the principle.

It has been held, that where one receives goods and chattels of another, on a contract by which he has a right to return them or pay a stipulated price or a right to return them or other goods. the property passes, and he is regarded a purchaser. 3 Mason's Rep. 478, Buffum v. Merry; Story on Bailment, 286; 1 Fair. Rep. 31, Holbrook v. Armstrong; 7 Cowen, 752, Hurd v. West; 2 Kent's Com. 463. If that be so, Wilson in this case had no option to return any other furniture, and there was an express stipulation

that the property should not be his until the price was paid. He cannot be regarded as a purchaser against the express agreement of the parties, and it is not contended that the property had passed. 4 Mass. 405, Hussey v. Thornton; 17 Mass. 606, Marston v. Baldwin. He was a bailee for hire, for a certain time, with a right to purchase if within that time he paid the price. This he had not done when he sold; and the contract by which he gained the right to purchase conferred on him no right to sell, nor in any manner enlarged his right as bailee. The goods still remained the property of the plaintiffs. When, therefore, he undertook to sell, and delivered the plaintiff's goods to others, in violation of any right which he then had, or for aught which appeared, ever would have, he forfeited the right to hold and use, and waived all benefit of it, having voluntarily deprived himself of that right—and the defendants could gain no right of possession, because Wilson had no power to communicate any such right to them. He had no interest which he could sell. 6 Green. Rep. 205.

These principles seem to be sound in themselves, and the authorities appear fully to sustain them.

In Farrant v. Thompson, 5 B. & Ald. 826, where certain mill machinery, together with a mill, had been demised for a term to a tenant, and he, without permission of his landlord, severed the machinery from the mill, and it was afterwards seized under a *fieri facias* by the sheriff, and sold by him, it was held that no property passed to the vendee, and that the landlord was entitled to bring trover for the machinery, even during continuance of the term. The court took a distinction between that case and Gordon v. Harper, 7 D. & E. 9, that in the latter case the goods removed were personal chattels, and the tenant had not by any wrongful act put an end to his qualified possession of them; and on this ground Pain v. Whitaker, Ryan & Moody 99, in no way conflicts with Farrant v. Thompson.

In Wilkinson v. King, 2 Camp. 335, the owner of goods sent them to a wharf where goods of the same sort were usually sold. The wharfinger, without any authority, sold them to a bona fide purchaser, who duly paid for them. Held, that the sale did not change the property, and that the owner might maintain trover against the purchaser.

In Loeschman v. Machin, 2 Stark. Rep. 311 where Brown, who

had hired a piano of the plaintiff, sent it to the defendant to be sold by auction, and the defendant, on the plaintiff's application, refused to deliver it—held, that he was liable in trover.

In Samuel v. Morris, 6 Car. & Payne. 620, the plaintiff had pledged certain goods to one James, to secure the payment of a debt. Mr. Baron Park said, if James had sold the goods it would have been such a wrongful act, and so inconsistent with the bailment, as to have immediately revested the right of possession in the bailor.

In Emerson v. Fisk, 6 Green. 200, where Michael & Alexander had made a contract with the plaintiff to cut certain pine timber, to transport one-fourth to a certain place for the owner, and to transport the other three-fourths to the same place, and agreed that the plaintiff should retain the ownership until satisfied that the quarter part first named was of an average quality with the whole, and until he was paid all debts due to him from M. & A., &c., and they sold their interest to the defendants, and the plaintiff replevied the logs while in transitu,—it was held, that the contractors had no authority to sell the logs—that if they had a special property, it was only as bailees for a special purpose—that the sale was entirely inconsistent with the rights of the plaintiff, as general owner—that by this unauthorized act the bailment, and their authority under it, was determined, and that the defendants could derive no rights from the tortious act of Michael & Alexander.

And in Galvin v. Bacon, 2 Fairfield 28,[1] the plaintiff, being the owner of a horse, bailed him to A, for use for a limited period, under the expectation of a purchase by the latter; and during the time, A, for a valuable consideration, and without notice, sold the horse to B, and he in like manner to the defendant. It was held, that no previous demand was necessary, to enable the owner to maintain replevin against the last purchaser. * * *

The plaintiff being the owner of the goods and having a right of possession, the only remaining question is, Does the case show a conversion by the defendants?

In Robinson v. Burleigh, 5 N. H. Rep. 225, it was held that a refusal to deliver goods when demanded is only evidence of a conversion, and when such refusal may be considered only as a result of a reasonable hesitation, in a doubtful matter, it is not

[1] 11 Me. 28.

sufficient evidence to prove a conversion. And this decision has been followed in subsequent cases. Fletcher v. Fletcher, 7 N. H. Rep. 452. Vide, also, 3 Stark. Ev. 1499; 5 B. & Ald. 247, Alexander v. Southey.

But in this case, all the defendants could require was time to examine into the right of the plaintiffs; and ample time appears to have been given for such examination, before this action was commenced. It was not necessary for the plaintiffs to make another demand. They were only bound to wait a reasonable time before commencing their suit, to give the defendants an opportunity to enquire and comply; and the plaintiffs having done this, the demand and refusal, and subsequent neglect, are sufficient evidence of a conversion.

It is not material, therefore, to enquire whether the action might not have been sustained without any demand. 2 Fair. R. 30. Judgment for the plaintiffs.

For What Property Trover Will Lie.

ASHTON v. ALLEN.

70 N. J. L. 117. 1903.

An action of trover for the value of 150 pounds of oats. There was judgment for the defendant and the plaintiff appealed. The facts are stated in the opinion.

GARRETSON, J. This is an appeal by the plaintiff from a judgment entered in the District Court of Trenton in favor of the defendant.

The following are the facts agreed upon by the parties to this suit:

On or about August 14th, 1901, the plaintiff was possessed of one hundred and fifty pounds of oats, valued at $69; that some person to the plaintiff unknown, representing himself as the agent of O. O. Bowman, or of O. O. Bowman & Son, requested the plaintiff to deliver the oats at the stable of the said Bowman, saying that the oats were wanted by the said Bowman; that the said unknown person also obtained permission from the said Bowman's servant to have the said oats deposited upon his premises; that the said plaintiff thereupon delivered said oats at the stable

of the said Bowman, depositing the same at the entrance of the stable or stable-yard of the said Bowman, where the man delivering the same was requested to deposit said oats. The said oats were charged upon the books of the plaintiff to the said Bowman; that the said plaintiff did not give credit to said unknown person who represented himself as the agent of the said Bowman, but afterwards the said unknown person procured a conveyance and carted said oats, which were in bags of said plaintiff, marked with plaintiff's name, from the place where they had been so deposited by the driver of the said plaintiff and took them to the defendants' place of business, where the defendants, in the usual course of business, purchased the said oats from the said unknown person, who represented himself as the owner thereof and received pay for the same from the defendants, and the said defendants received possession and retained possession of the said oats.

The said defendants were bona fide purchasers of said oats for a valuable consideration, and without notice of any fraud or misdoing upon the part of the said unknown person or any other person in connection with said transaction.

It is clear from the foregoing statement of facts that it was never the intention of the plaintiff to part with his title in or possession of the oats or to deliver them to the unknown person. His intention was to transfer the title and possession to Bowman. It is not one of those cases in which the owner of goods, relying upon false representations which he believed to be true, parts with the title and possession of his goods, intending to transfer them to the maker of the false representations. In such cases the title to the goods actually passes out of the owner and he intends it shall so pass to the one making the false representations. In such case he may avoid his contract, but if, before that is done, this wrongdoer has parted with the title to an innocent purchaser, the original owner is without remedy against such innocent purchaser.

To this effect are the cases of Rowley v. Bigelow, 12 Pick. 307, and Hoffman v. Noble, 6 Met. 68.

But where the vendor has not parted with the title to the one making the false representations, the latter has no title to transfer—no contract of sale ever existed between them.

In 1 Benj., Sales (Corbin's notes), s. 648, the rule is stated to be:

"Whenever goods are obtained from their owner by fraud, we must distinguish whether the facts show a sale to the party guilty of the fraud or a mere delivery of the goods into his possession induced by fraudulent devices on his part. In other words, we must ask whether the owner intended to transfer both the property in, and the possession of the goods to the person guilty of the fraud, or to deliver nothing more than the bare possession. In the former case there is a contract of sale, however fraudulent the device, and the property passes; but not in the latter case. § 649. In the former case the contract is voidable at the election of the vendor, not void ab initio. It follows, therefore, that the vendor may affirm and enforce it or may rescind it. He may sue in assumpsit for the price and this affirms the contract, or he may sue in trover for the goods or their value and this disaffirms it. But in the meantime, and until he elects, if the vendee transfer the goods in whole or part, whether the transfer be of a general or special property in them, to an innocent third person for a valuable consideration, the rights of the original vendor will be subordinate to those of such innocent third person. If, on the contrary, the intention of the vendor was not to pass the property, but merely to part with the possession of the goods, there is no sale, and he who obtains possession by fraud can convey no property in them to any third person, however innocent, for no property has passed to himself from the true owner." Cundy v. Lindsay, L. R., 3 App. Cas. 459; Hardman v. Booth, 1 Hurlst. & C. 803; Higgins v. Barton, 26 L. J. Exch. 342; Dean v. Yates, 23 Ohio St. 388; Hamet v. Letcher, 37 Id. 356; Moody v. Blake, 117 Mass. 23; Barker v. Dinsmore, 72 Pa. 427; Decan v. Shipper, 35 Id. 239.

The judgment below will be reversed and judgment entered for the plaintiff for $69 and costs.

CHAPTER III.

PARTICULAR INSTANCES OF CONVERSION.

Conversion by Bailee.

EDMUNDS v. MERCHANTS DESPATCH COMPANY.

135 Mass. 283. 1883.

Three actions in tort, with counts in contract, against a common carrier to recover the value of certain goods entrusted to the defendant by the plaintiffs, at Boston, for carriage to Dayton, Ohio. There was a verdict for the plaintiffs; and the defendant alleged exceptions. The facts appear in the opinion.

MORTON, C. J. These three cases were tried together. In some features they resemble the case of Samuel v. Cheney, 135 Mass. 278. In other material features they differ from it. They also in some respects differ from each other. In two of the cases, a swindler, representing himself to be Edward Pape of Dayton, Ohio, who is a reputable and responsible merchant, appeared personally in Boston, and bought of the plaintiffs the goods which are the subject of the suits respectively. In those cases, we think it clear, upon principle and authority, that there was a sale, and the property in the goods passed to the purchaser. The minds of the parties met and agreed upon all the terms of the sale, the thing sold, the price and time of payment, the person selling and the person buying. The fact that the seller was induced to sell by fraud of the buyer made the sale voidable, but not void. He could not have supposed that he was selling to any other person; his intention was to sell to the person present, and identified by sight and hearing; it does not defeat the sale because the buyer assumed a false name, or practised any other deceit to induce the vendor to sell.

In Cundy v. Lindsay, 3 App. Cas. 459, 464, where the question was whether a man, who in good faith had bought chattels of a swindler who had obtained possession of them by fraud, could

hold them against the former owner, Lord Chancellor Cairns states the rule to be that, "if it turns out that the chattel has come into the hands of the person who professed to sell it, by a de facto contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title."

In the cases before us, there was a de facto contract, purporting, and by which the plaintiffs intended, to pass the property and possession of the goods to the person buying them; and we are of opinion that the property did pass to the swindler who bought the goods. The sale was voidable by the plaintiffs; but the defendant, the carrier by whom they were forwarded, had no duty to inquire into its validity. The person who bought them, and who called himself Edward Pape, owned the goods, and upon their arrival in Dayton had the right to demand them of the carrier. In delivering them to him, the carrier was guilty of no fault or negligence. It delivered them to the person who bought and owned them, who went by the name of Edward Pape, and thus answered the direction upon the packages, and who was the person to whom the plaintiffs sent them. Dunbar v. Boston & Providence Railroad, 110 Mass. 26. The learned judge who tried the cases in the Superior Court based his charge upon a different view of the law; and, as the three cases were tried together, there must be a new trial in each.

It seems to have been assumed that the same questions are raised in each case. It is proper that we should add that the third case differs materially from the others. In that case, the contract did not purport, nor the plaintiffs intend, to sell to the person who was present and ordered the goods. The swindler introduced himself as a brother of Edward Pape of Dayton, Ohio, buying for him. By referring to the mercantile agency, he tacitly represented that he was buying for the Edward Pape who was there recorded as a man of means. The plaintiffs understood that they were selling, and intended to sell, to the real Edward Pape. There was no contract made with him, because the swindler who acted as his agent had no authority, but there was no contract of sale made with any one else. The relation of vendor and vendee never existed between the plaintiffs and the swindler. The property in the goods, therefore, did not pass to the swindler; and the defendant cannot defend, as

in the other cases, upon the ground that it has delivered the goods to the real owner. Hardman v. Booth, 32 L. J. (N. S.) Ex. 105. Kingsford v. Merry, 26 L. J. (N. S.) Ex. 83. Barker v. Dinsmore, 72 Penn. St. 427.

Whether the defendant has any other justification or excuse for delivering the goods to the swindler is a question not raised by this bill of exceptions, and not considered at the trial; and therefore we cannot express an opinion upon it.

Exceptions sustained.

LEADING ILLUSTRATIVE CASES
LAW OF TORTS

PART III

LEGAL CAUSE AND NEGLIGENCE

CHAPTER I.

LEGAL CAUSE.

The "But For" Rule.

GILMAN v. NOYES.

57 N. H. 627. 1876.

[Case, for carelessly leaving the plaintiff's bars down, whereby his cattle and sheep escaped, and he was compelled to expend, and did expend, time and money in hunting for the same, and his sheep were wholly lost.

The evidence tended to show that the defendant, in looking after his own cattle, left the plaintiff's bars down, and that his cattle, and three sheep, belonging to one Marshall, and which the plaintiff was pasturing, were wholly lost. * * * The sheep were destroyed by bears after they had escaped from the plaintiff's pasture. The defendant claimed that the damages were too remote, and that they were not the natural consequences of the alleged careless acts of the defendant.

* * * The court instructed the jury, among other things, that if the defendant left the plaintiff's bars down, and his cattle thereby escaped, he was entitled to recover for the time and money expended in hunting for them; that if the sheep were in his possession and care, and they escaped in consequence of the bars being left down by the defendant, and would not have been killed but for the act of the defendant, he was liable for their value.

* * * The jury returned a verdict for the plaintiff, and assessed the damages for hunting the cattle at $13.16, and for the sheep at $9. * * *]

SMITH, J. * * * The rule, that the plaintiff can recover only when the defendant's act or negligence was the proximate cause of the injury, is one of universal application; but the difficulty lies in determining when the cause is proximate and when remote. It is a mixed question of law and of fact, to be submitted to the jury under proper instructions. We have recently held that it is always for the jury to say whether the damage sustained is what the defendant ought to have expected, in the exercise of reasonable care and discretion. * * *

In this case the evidence tended to show the intervention of a new cause of the destruction of the plaintiff's sheep after their escape from his pasture, which could not reasonably have been anticipated. The only practicable rule to be drawn from all the cases, for determining this case, it seems to me, is to inquire whether the loss of the plaintiff's sheep by bears was an event which might reasonably have been anticipated from the defendant's act in leaving his bars down, under all the circumstances of the case. If it was a natural consequence which any reasonable person could have anticipated, then the defendant's act was the proximate cause. If, on the other hand, the bears were a new agency, which could not reasonably have been anticipated, the loss of the sheep must be set down as a remote consequence, for which the defendant is not responsible.

The jury were instructed that if the sheep escaped in consequence of the bars being left down by the defendant, and would not have been killed but for this act of the defendant, he was liable. Under these instructions the jury could not inquire whether the destruction of the sheep by the bears was an event which might reasonably have been anticipated from the leaving of the bars down, and for this reason I agree that the verdict must be set aside.

LADD, J. I am unable to free my mind from considerable doubt as to the correctness of the ground upon which my brethren put the decision of this case.

The defendant requested the court to charge that, if the jury found that the sheep were killed by bears after their escape, the damages would be too remote. This the court declined to do, but did instruct them that if the sheep escaped in consequence of the bars being left down by the defendant, and would not have been killed but for that act of the defendant, he was liable for their value. Both the request and the instruction went upon the ground that the question of remoteness—all the facts being found—was for the court, and not for the jury. Upon that distinct and simple question the defendant claimed one way and the court held the other. I understand it to be the opinion of my brethren that neither was right; that the question of remoteness was for the jury, and that the court erred in not so treating it. Whether it is for the jury or the court, every one who has considered the matter will agree that it is almost always a troublesome question, and often one attended with profound intrinsic difficulty.

The verdict here settles (1) that the bars were left down by the defendant; (2) that the sheep escaped in consequence thereof; (3) that they would not otherwise have been killed. Was the defendant's act the proximate cause of the damage? Was it the cause in such sense that the law will take cognizance of it by holding the defendant liable to make reparation in damages? And is that question one for the court, or for the jury, to decide? The sheep would not have been killed, the jury say, but for that act; does it follow that the damage was not too remote? Certainly, I think, it does not. That one event would not have happened but for the happening of some other, anterior in point of time, doubtless goes somewhat in the direction of establishing the relation of cause and effect between the two. But no rule of law as to remoteness can, as it seems to me, be based upon that one circumstance of relation alone, because the same thing may very likely be true with respect to many other antecedent events at the same time. The human powers are not sufficient to trace any event to all its causes, or to say that anything which happens would have happened just as it did but for the happening of myriads of other things more or less remote and apparently independent. The maxim of the schoolmen,—*Causa causantis, causa est causati,*—may be true, but it obviously leads into

a labyrinth of refined and bewildering speculations whither the law cannot attempt to follow. This case furnishes an illustration. The jury say the sheep would not have been killed by bears but for their escape, and would not have escaped but for the bars being left down. But it is equally certain, without any finding of the jury, that they would not have been killed by bears if the bears had not been there to do the deed; and how many antecedent facts the presence of the bears may involve, each one of which bore a causative relation to the principal fact sufficiently intimate so that it may be said the latter would not have occurred but for the occurrence of the former, no man can say. Suppose the bears had been chased by a hunter, at an indefinite time before, whereby a direction was given to their wanderings which brought them into the neighborhood at this particular time; suppose they were repulsed the night before in an attack upon the beehives of some farmer in a distant settlement, and, to escape the stings of their vindictive pursuers, fled, with nothing but chance to direct their course, towards the spot where they met the sheep; suppose they were frightened that morning from their repast in a neighboring cornfield, and so brought to the place of the fatal encounter just at that particular point of time.

Obviously, the number of events in the history not only of those individual bears, but of their progenitors clear back to the pair that, in instinctive obedience to the divine command, went unto Noah in the ark, of which it may be said, but for this the sheep would not have been killed, is simply without limit. So the conduct of the sheep, both before and after their escape, opens a field for speculation equally profound and equally fruitless. It is easy to imagine a vast variety of circumstances, without which they would not have made their escape just at the time they did, though the bars were down; or, having escaped, would not have taken the direction to bring them into the way of the bears just in season to be destroyed, as they were. Such a sea of speculation has neither shores nor bottom, and no such test can be adopted in drawing the uncertain lines between consequences that are actionable and those which are not.

Some aid in dealing with this question of remoteness in

particular cases is furnished by Lord Bacon's rule, *In jure causa proxima, non remota spectatur,* and other formulas of a like description, because they suggest some boundaries, though indistinct, to a wilderness that otherwise, and perhaps in the nature of things, has no limit. * * *

The question is, whether courts can relieve themselves from troublesome inquiries of this description by handing them over to the jury for determination. I am not now prepared to admit that they can. In this case, as we have seen, the verdict settles that the defendant left the bars down, that the sheep escaped in consequence, and that they would not have been killed but for their escape. Clearly, no disputed fact is left unsettled. * * *

Of course all matters of fact, with respect to the causative relation that exists between the act complained of and the injurious consequences for which damages are sought, must be found by the jury;—and so, in one sense, it may be said that the question of remoteness is for the jury, under proper instructions by the court;—but my doubt is, whether proper instructions by the court should not contain specific direction as to whether any given fact of injury, if found proved, would or would not, with respect to the alleged cause, occupy the position of remoteness beyond the actionable degree. * * *

According to the views of a majority of the court, there was a new trial granted.

Probable Consequence Rule.

MILWAUKEE AND SAINT PAUL RAILWAY COMPANY v. KELLOGG.

94 U. S. 469. 1876.

MR. JUSTICE STRONG delivered the opinion of the court.

This was an action to recover compensation for the destruction by fire of the plaintiff's saw-mill and a quantity of lumber, situated and lying in the state of Iowa, and on the banks of the river Mississippi. That the property was destroyed by fire was uncontroverted. From the bill of exceptions, it appears that the "plaintiff alleged the fire was negligently communicated from the defendants' steamboat 'Jennie

Brown' to an elevator built of pine lumber, and one hundred and twenty feet high, owned by the defendants, and standing on the bank of the river, and from the elevator to the plaintiff's saw-mill and lumber piles, while an unusually strong wind was blowing from the elevator towards the mill and lumber." On the trial, it was admitted that the defendants owned the steamboat and elevator; that the mill was five hundred and thirty-eight feet from the elevator, and that the nearest of plaintiff's piles of lumber was three hundred and eighty-eight feet distant from it. * * *

The next exception is to the refusal of the court to instruct the jury as requested, that "if they believed the sparks from the 'Jennie Brown' set fire to the elevator through the negligence of the defendants, and the distance of the elevator from the nearest lumber pile was three hundred and eighty-eight feet, and from the mill five hundred and twenty-eight feet, then the proximate cause of the burning of the mill and lumber was the burning of the elevator, and the injury was too remote from the negligence to afford a ground for a recovery." This proposition the court declined to affirm, and in lieu thereof submitted to the jury to find whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which, under the circumstances, would naturally follow from the burning of the elevator; and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected. All this is alleged to have been erroneous. The assignment presents the oft-embarrassing question, what is and what is not the proximate cause of an injury. The point propounded to the court assumed that it was a question of law in this case; and in its support the two cases of Ryan v. The New York Central Railroad Co., 35 N. Y. 210, and Kerr v. Pennsylvania Railroad Co., 62 Penn. St. 353, are relied upon. Those cases have been the subject of much criticism since they were decided; and it may, perhaps, be doubted whether they have always been quite understood. If they were intended to assert the doctrine that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion

of law that the owner of the second has no recourse to the negligent wrong-doer, they have not been accepted as authority for such a doctrine, even in the states where the decisions were made. * * *

The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place. 2 Bl. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height, and the proximity and combustible nature of the sawmill and the piles of lumber. Most of these circumstances were ignored in the request for instruction to the jury. Yet it is obvious that the immediate and inseparable consequences of negligently firing the elevator would have been very different if the wind had been less, if the elevator had been a low building constructed of stone, if the season had been wet, or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable consequences of their negligence as much more far-reaching than would have been natural or probable in other circumstances. We do not say that even the natural and probable

consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events an interval must always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second, was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for rules of social conduct. In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time. * * *

Judgment for plaintiff affirmed.

THE DUBUQUE WOOD AND COAL ASSOCIATION v. THE CITY AND COUNTY OF DUBUQUE.

30 Iowa 176. 1870.

[Action at law. The petition avers, that, prior to the date when plaintiff's cause of action accrued, there had been erected and maintained a bridge on Seventh street in the city of

Dubuque over a slough of the Mississippi river; that Seventh street was a highway leading from the business portion of the city to the levee upon the river, and as such, was used by the public; that said bridge was a county bridge, and it was the duty of the city as well as the county to rebuild it after it became impassable; that before the bridge became impassable, a large quantity of wood being deposited upon the levee, as was customary, was purchased by plaintiff for the purpose of reselling to its customers in the city of Dubuque; that the levee was liable to be overflowed by the river, and the street upon which the bridge in question was erected was the only way over which the wood could have been transported to plaintiff's customers. On account of the bridge becoming impassable, and of the negligence of defendants, in failing to rebuild it, plaintiff was unable to remove his wood. Subsequently, but prior to any repairs made upon the bridge, the wood was lost by a flood in the river. The defendants provided no other bridge or way, while the bridge in question was unfit for use, by which plaintiff could have removed the wood.

The defendants separately demurred to the petition, alleging that it exhibited no cause of action, and each claiming not to be liable upon the state of facts set out in the petition. The demurrers were sustained and plaintiff appeals. * * *]

BECK, J. * * * The rule limiting the recovery of damage to "the natural and proximate consequence of the act complained of" is universally admitted, and the extreme difficulty in its practical application is quite as widely conceded. The difficulty results not from any defect in the rule, but in applying a principle, stated in such general language, to cases of diverse facts. The dividing line between proximate and remote damages is so indistinct, if not often quite invisible, that there is, on either side, a vast field of doubtful and disputed ground.

In exploring this ground there is to be had but little aid from the light of adjudicated cases. The course followed in each case, which is declared to be upon one side or the other of the dividing line, is plainly marked out, but no undisputed landmarks are established by which the dividing

line itself may be precisely traced. As so little aid is derived from precedents in arriving at the conclusions we have reached, it would prove quite useless to refer to them.

Damage to be recoverable must be the proximate consequence of the act complained of; that is, it must be the consequence that follows the act, and not the secondary result from the first consequence, either alone or in combination with other circumstances.

An illustration will serve the purpose of more clearly expressing the principle. An owner of lumber deposited upon the levee of the city of Dubuque, exposed to the floods of the river, starts with his team to remove it. A bridge built by the city which he attempts to cross, from defects therein, falls, and his horses are killed. By the breaking of the bridge and the loss of his team, he is delayed in removing his property. On account of this delay his lumber is carried away by the flood and lost. The proximate consequence of the negligence of the city is the loss of his horses. The secondary consequence, resulting from the first consequence, is the delay in removing the lumber, which, finally, caused its loss. Damage on account of the first is recoverable, but for the second, is denied.

Applying these principles to the case before us, we conclude that the losses for which recovery is sought were not the proximate consequence of the negligence of defendants complained of in the petition. The proximate consequence of the bridge of defendants becoming impassable was not the loss of plaintiff's wood. The loss resulted from the flood. It does not appear from the petition that the negligence of defendants in failing to repair the bridge, whereby plaintiff was prevented removing the wood, exposed plaintiff to any other loss.

All that can be said is, that defendants' negligence caused plaintiff to delay removing the wood; the delay exposed the wood to the flood, whereby it was lost. Plaintiff's damage, then, was not the proximate consequence of the acts of defendants complained of, but resulting from a remote consequence joined with another circumstance, the flood. The case is not distinguishable from the supposed case above stated.

In our opinion the demurrer was correctly sustained.

Affirmed.

Intervening Acts of Nature.

DENNY v. NEW YORK CENTRAL RAILROAD COMPANY.

13 Gray 481 (Mass.). 1859.

MERRICK, J. This action is brought to recover compensation for damages alleged to have been sustained by the plaintiff in consequence of an injury to a quantity of his wool delivered to the defendants to be transported for him from Suspension Bridge to Albany. It appears from the report that the wool, directed to Boston, was received by them at the former, and carried to the latter place, and was there safely deposited in their freight depot. But it was not transported seasonably nor with reasonable dispatch. By their failure to exercise the degree of care and diligence required of them by law, it was detained six days at Syracuse, and consequently arrived at Albany so many days later than it should regularly have been there. Whilst it was lying in the defendant's freight depot in that city, it was submerged by a sudden and violent flood in the Hudson river. This rise of the water caused the alleged injury to the wool.

* * * It is said to be an ancient and universal rule resting upon obvious reason and justice, that a wrongdoer shall be held responsible only for the proximate and not for the remote consequences of his actions. * * * In this case, the defendants failed to exercise due care and diligence, in not being possessed of a sufficient number of efficient working engines to transport the plaintiff's wool with the usual, ordinary and reasonable speed. The consequence of this failure on their part was that the wool was detained six days at Syracuse. This was the full and entire effect of their negligence, and for this they are clearly responsible. But in all that occurred afterwards there was no failure in the performance of their duty. There was no delay and no negligence in any part of the transportation between Syracuse and Albany, and upon reaching the latter place the wool was safely and properly stored in their freight depot. It was their duty to make this disposition of it. They had reached the terminus of their road; the carriage of the goods was then complete; and the duty only remained of making the delivery. The deposit of the wool

in the depot was the only delivery which they were required to make; and having made that, their liabilities as carriers thenceforward ceased. It was there to be received by the owner, or taken up by the proprietors of the railroad next in course of the route to Boston. * * * The rise of waters in the Hudson, which did the mischief to the wool, occurred at a period subsequent to this, and consequently was the direct and proximate cause to which that mischief is to be attributed. The negligence of the defendants was remote; it has ceased to operate as an active, efficient and prevailing cause as soon as the wool had been carried on beyond Syracuse, and cannot therefore subject them to responsibility for an injury to the plaintiff's property, resulting from a subsequent inevitable accident which was the proximate cause by which it was produced. It is to the latter only to which the loss sustained by him is attributable. * * *

New trial ordered.

Intentional Acts of Third Person.

VICARS v. WILCOCKS.

8 East 1 (Eng.). 1806.

[In an action on the case for slander the plaintiff declared, that whereas he was retained and employed by one J. O. as a journeyman for wages, the defendant knowing the premises, and maliciously intending to injure him, and to cause it to be believed by J. O. and others that the plaintiff had been guilty of unlawfully cutting the cordage of the defandant, and to prevent the plaintiff from continuing in the service and employ of J. O. and to cause him to be dismissed therefrom, and to impoverish him; in a discourse with one J. M. concerning the plaintiff and concerning certain flocking cord of the defendant alleged to have been before then cut, said that he (the defendant) had last night some flocking cord cut into six-yard lengths, but he knew who did it; for it was William Vicars; meaning that the plaintiff had unlawfully cut the said cord. And so it stated other like discourse with other third persons, imputing to the plaintiff that he had maliciously cut the defendant's cordage in his rope-yard.

By reason whereof the said J. O., believing the plaintiff to have been guilty of unlawfully cutting the said flocking cord, etc., discharged him from his service and employment, and has always since refused to employ him; and also one R. P. to whom the plaintiff applied to be employed after his discharge from J. O., on account of the speaking and publishing the said slanderous words, and on no other account whatsoever, refused to receive the plaintiff into his service. And by reason of the premises the plaintiff has been and still is out of employ and damnified, etc.

* * * The plaintiff was thereupon nonsuited; it being admitted that the words in themselves were not actionable without special damage; and the learned Judge being of opinion that the plaintiff having been retained by his master under a contract for a certain time then unexpired, it was not competent for the master to discharge him on account of the words spoken; but it was a mere wrongful act of the master, for which he was answerable in damages to the plaintiff; that the supposed special damage was the loss of those advantages which the plaintiff was entitled to under his contract with his master, which he could not in law be considered as having lost, as he still had a right to claim them of his master, who, without a sufficient cause, had refused to continue the plaintiff in his service. Secondly, with respect to the subsequent refusal of R. P. to employ the plaintiff, that it did not appear to be merely on account of the words spoken; but rather on account of his former master having discharged him in consequence of the accusation; without which he might not have regarded the words.

Jervis now moved to set aside the nonsuit. * * *]

LORD ELLENBOROUGH, C. J., said, that the special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration: and here it was an illegal consequence: a mere wrongful act of the master; for which the defendant was no more answerable than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff, and thrown him into a horsepond by way of punishment for his supposed transgression. And his Lordship asked whether any case could be

mentioned of an action of this sort sustained by proof only of an injury sustained by the tortious act of a third person. Upon the second ground, *non liquet* that the refusal by R. P. to employ the plaintiff was in consequence of the words spoken, as it is alleged to be: there was at least a concurrent cause, the act of his former master in refusing to continue him in his employ; which was more likely to weigh with R. P. than the mere words themselves of the defendant.

The other judges concurring. Rule refused.

GUILLE v. SWAN.

19 Johns. 381 (N. Y.). 1822.

[Swan sued Guille in the Justices' Court, in an action of trespass, for entering his close, and treading down his roots and vegetables, etc., in a garden in the city of New York. The facts were, that Guille ascended in a balloon in the vicinity of Swan's garden, and descended into his garden. When he descended his body was hanging out of the car of the balloon in a very perilous situation, and he called to a person at work in Swan's field to help him, in a voice audible to the pursuing crowd. After the balloon descended, it dragged along over potatoes and radishes, about thirty feet, when Guille was taken out. The balloon was carried to a barn at the farther end of the premises. When the balloon descended, more than two hundred persons broke into Swan's garden through the fences, and came on his premises, beating down his vegetables and flowers. The damage done by Guille, with his balloon, was about 15 dollars, but the crowd did much more. The plaintiff's damages, in all, amounted to 90 dollars. It was contended before the Justice that Guille was answerable only for the damage done by himself, and not for the damage done by the crowd. The Justice was of the opinion, and so instructed the jury, that the defendant was answerable for all the damages done to the plaintiff. The jury, accordingly, found a verdict for him, for 90 dollars, on which the judgment was given, and for costs.

The cause was submitted to the court on the return, with the briefs of the counsel, stating the points and authorities.]

SPENCER, C. J., delivered the opinion of the court. The counsel for the plaintiff in error supposes that the injury committed by his client was involuntary, and that done by the crowd was voluntary, and that, therefore, there was no union of intent; and that upon the same principle which would render Guille answerable for the acts of the crowd, in treading down and destroying the vegetables and flowers of S., he would be responsible for a battery, or a murder committed on the owner of the premises.

The intent with which an act is done is by no means the test of the liability of a party to an action of trespass. If the act cause the immediate injury, whether it was intentional, or unintentional, trespass is the proper action to redress the wrong. It was so decided upon a review of all the cases, in Percival v. Hickey, 18 Johns. Rep. 257. Where an immediate act is done by the co-operation, or the joint act of several persons, they are all trespassers, and may be sued jointly or severally; and any one of them is liable for the injury done by all. To render one man liable in trespass for the acts of others, it must appear, either that they acted in concert, or that the act of the individual sought to be charged, ordinarily and naturally, produced the acts of the others. The case of Scott v. Shepard, 2 Black. Rep. 892, is a strong instance of the responsibility of an individual who was the first, though not the immediate agent in producing an injury. Shepard threw a lighted squib, composed of gunpowder, into a market house, where a large concourse of people were assembled; it fell on the standing of Y., and to prevent injury, it was thrown off his standing, across the market, when it fell on another standing, from thence, to save the goods of the owner, it was thrown to another part of the market house and in so throwing it, it struck the plaintiff in the face, and, bursting, put out one of his eyes. It was decided, by the opinions of three Judges against one, that Shepard was answerable in an action of trespass, and assault and battery. De Grey, Ch. J., held, that throwing the squib was an unlawful act, and that whatever mischief followed, the person throwing it was the author of the mischief. All that was done subsequent to the original throwing was a continuation of the first force and first act. Any innocent person removing the danger from himself was justifiable; the

blame lights upon the first thrower; the new direction and new force flow out of the first force. He laid it down as a principle, that every one who does an unlawful act is considered as the doer of all that follows. A person breaking a horse in Lincolns-Inn-Fields, hurt a man, and it was held that trespass would lie. In Leame v. Bray, 3 East Rep. 595, Lord Ellenborough said, "If I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue, I am answerable in trespass;" and if one (he says) put an animal or carriage in motion, which causes an immediate injury to another, he is the actor, the *causa causans*.

I will not say that ascending in a balloon is an unlawful act, for it is not so; but, it is certain, that the aeronaut has no control over its motion horizontally; he is at the sport of the winds, and is to descend when and how he can; his reaching the earth is a matter of hazard. He did descend on the premises of the plaintiff below, at a short distance from the place where he ascended. Now, if his descent, under such circumstances, would, ordinarily and naturally, draw a crowd of people about him, either from curiosity, or for the purpose of rescuing him from a perilous situation, all this he ought to have foreseen, and must be responsible for. Whether the crowd heard him call for help or not is immaterial; he had put himself in a situation to invite help, and they rushed forward, impelled, perhaps, by the double motive of rendering aid, and gratifying a curiosity which he had excited. Can it be doubted, that if the plaintiff in error had beckoned to the crowd to come to his assistance, that he would be liable for their trespass in entering the enclosure? I think not. In that case, they would have been co-trespassers, and we must consider the situation in which he placed himself, voluntarily and designedly, as equivalent to a direct request to the crowd to follow him. In the present case, he did call for help, and may have been heard by the crowd; he is, therefore, undoubtedly, liable for all the injury sustained.

Judgment affirmed.

CHAPTER II.

NEGLIGENCE.

Legal Duty.

BLACK v. NEW YORK, N. H. & H. R. R. CO.

193 Mass. 448, 79 N. E. 797. 1907.

[Black took the 9:23 p. m. train in Boston for Ashmont. He was in an intoxicated condition. On arrival at Ashmont, the conductor and brakeman took him off the car and led him to steps by which the walk was reached. There was evidence that they tried to stand him up, but his legs would sink from under him. They carried him to the steps and up as far as the sixth step of a flight of eleven, and then left him. He balanced himself there a minute and then fell backward, turning a somersault and striking on the back of his head. There was a railing to the steps but Black did not have hold of it. Action for personal injuries.]

KNOWLTON, J. * * * On this testimony the jury might find that the plaintiff was so intoxicated as to be incapable of standing or walking, or caring for himself in any way, and that the defendant's servants, knowing his condition, left him near the top of the steps, where they knew, or ought to have known, that he was in great danger of falling and being seriously injured. They were under no obligation to remove him from the car, or to provide for his safety after he left the car. But they voluntarily undertook to help him from the car, and they were bound to use ordinary care in what they did that might affect his safety. Not only in the act of removal, but in the place where they left him, it was their duty to have reasonable regard for his safety in view of his manifest condition. The jury might have found that they were negligent in leaving him on the steps where a fall would be likely to do him much harm. Moody v. Boston & Maine R. R., 189 Mass. 277, 75 N. E. 631.

The defense rests principally upon the fact that the plaintiff was intoxicated, and was incapable of caring for himself after he was taken from the train, and therefore was not in the exercise of due care. If his voluntary intoxication was a direct and proximate cause of the injury, he cannot recover. The plaintiff contends that it was not a cause, but a mere condition, well known to the defendant's servants, and that their act was the direct and proximate cause of the injury, with which no other act or omission had any causal connection. The distinction here referred to is well recognized in law. Negligence of a plaintiff at the time of an injury caused by the negligence of another is no bar to his recovery from the other, unless it was a direct, contributing cause to the injury, as distinguished from a mere condition, in the absence of which the injury would not have occurred. * * *

The rule applies, in like manner, where the plaintiff's act is illegal as distinguished from negligent, so that the defendant's liability is only for wanton and reckless conduct to the plaintiff's injury. McKeon v. N. Y., N. H. & H. R. R. Co., 183 Mass. 271, 67 N. E. 329, 97 Am. St. Rep. 437; Palmer v. Gordon, 173 Mass. 410, 53 N. E. 909, 73 Am. St. Rep. 302; Lovett v. Salem, etc., R. R. Co., 9 Allen, 557-563. In this latter class of cases, where the negligence is wanton and reckless to such a degree as to be in its nature a willful wrong, it is held that, although the plaintiff makes an averment of due care on his part, this means only due care in reference to the direct and proximate cause of the injury, and, such a gross wrong of the defendant being shown to be the cause, it prima facie so far excludes participation in it by the plaintiff, as to relieve him from the necessity of offering affirmative evidence of his care. Aiken v. Holyoke St. Ry. Co., 184 Mass. 269, 68 N. E. 238; Bjornquist v. Boston & Albany R. R. Co., 185 Mass. 130, 70 N. E. 53, 102 Am. St. Rep. 332; Banks v. Braman, 188 Mass. 367, 74 N. E. 594. The fundamental principle is the same in both classes of cases. It is that the plaintiff's condition, resulting from his prior negligence or wrong, is not a direct and proximate cause of the latter injury, inflicted by one who acts independently, with knowledge of this condition and in reference to it. The principle has been generally recognized, both in England and America. Davies v. Mann, 10 M. & W.

545; Radley v. London & N. W. Railway Co., L. R. 1 App. Cas. 754.

The rule has often been applied in favor of plaintiffs whose intoxication prevented them from using care to protect themselves from the consequences of a subsequent act of negligence of another person, done with knowledge of their intoxication. * * *

The application of this rule sometimes gives rise to difficult questions. But in this connection the doctrine has been established that, when the plaintiff's negligence or wrongdoing has placed his person or property in a dangerous situation which is beyond his immediate control, and the defendant, having full knowledge of the dangerous situation, and full opportunity, by the exercise of reasonable care, to avoid any injury, nevertheless causes an injury, he is liable for the injury. This is because the plaintiff's former negligence is only remotely connected with the accident, while the defendant's conduct is the sole, direct and proximate cause of it.

The question that we have been discussing was not considered in Holland v. West End St. Ry. Co., 155 Mass. 387, 29 N. E. 622. It does not appear that there was evidence of negligence on the part of the defendant in that case, or that anything was done in reference to the plaintiff with knowledge of his intoxication. * * *

We are of opinion that the jury in the present case might have found that the plaintiff was free from any negligence that was a direct and proximate cause of the injury.

Exceptions sustained.

Duty of Maker or Vendor of Chattel.

THOMAS v. WINCHESTER.

6 N. Y. 397. 1852.

RUGGLES, C. J., delivered the opinion of the court. This is an action brought to recover damages from the defendant for negligently putting up, labeling and selling as and for the extract of dandelion, which is a simple and harmless medicine, a jar of the extract of belladonna, which is a deadly poison; by means of which the plaintiff, Mary Ann Thomas,

to whom, being sick, a dose of dandelion was prescribed by a physician, and a portion of the contents of the jar was administered as and for the extract of dandelion, was greatly injured, etc.

The facts proved were briefly these: Mrs. Thomas being in ill health, her physician prescribed for her a dose of dandelion. Her husband purchased what was believed to be the medicine prescribed at the store of Dr. Foord, a physician and druggist in Cazenovia, Madison County, where the plaintiffs reside.

A small quantity of the medicine thus purchased was administered to Mrs. Thomas, on whom it produced very alarming effects; such as coldness of the surface and extremities, feebleness of circulation, spasms of the muscles, a giddiness of the head, dilation of the pupils of the eyes, and derangement of mind. She recovered, however, after some time, from its effects, although for a short time her life was thought to be in danger. The medicine administered was belladonna, and not dandelion. The jar from which it was taken was labeled, "½ lb. dandelion, prepared by A. Gilbert, No. 108 John street, N. Y. Jar 8 oz." It was sold for and believed by Dr. Foord to be the extract of dandelion as labeled. Dr. Foord purchased the article as the extract of dandelion from Jas. S. Aspinwall, a druggist at New York. Aspinwall bought it of the defendant as extract of dandelion, believing it to be such. The defendant was engaged at No. 108 John street, New York, in the manufacture and sale of certain vegetable extracts for medicinal purposes, and in the purchase and sale of others. The extracts manufactured by him were put up in jars for sale, and those which he purchased were put up by him in like manner. The jars containing extracts manufactured by himself and those containing extracts purchased by him from others, were labeled alike. Both were labeled like the jar in question, as "prepared by A. Gilbert." Gilbert was a person employed by the defendant at a salary, as an assistant in his business. The jars were labeled in Gilbert's name because he had previously engaged in the same business on his own account at No. 108 John street, and probably because Gilbert's labels rendered the articles more salable. The extract contained in the jar sold to Aspinwall, and by him to Foord, was

not manufactured by the defendant, but was purchased by him from another manufacturer or dealer. The extract of dandelion and the extract of belladonna resemble each other in color, consistence, smell and taste; but may on careful examination be distinguished the one from the other by those who are well acquainted with these articles. Gilbert's labels were paid for by Winchester, and used in his business with his knowledge and assent.

* * * The case depends on the first point taken by the defendant on his motion for a nonsuit; and the question is whether the defendant, being a remote vendor of the medicine, and there being no privity or connection between him and the plaintiffs, the action can be maintained.

If, in labeling a poisonous drug with the name of a harmless medicine, for public market, no duty was violated by the defendant, excepting that he owed to Aspinwall, his immediate vendee, in virtue of his contract of sale, this action cannot be maintained. If A. build a wagon and sell it to B., who sells it to C., and C. hires it to D., who, in consequence of the gross negligence of A. in building the wagon, is overturned and injured, D. cannot recover damages against A., the builder. A.'s obligation to build the wagon faithfully arises solely out of his contract with B. The public have nothing to do with it. Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence; and such negligence is not an act imminently dangerous to human life.

So, for the same reason, if a horse be defectively shod by a smith, and a person hiring the horse from the owner is thrown and injured in consequence of the smith's negligence in shoeing; the smith is not liable for the injury. The smith's duty in such case grows exclusively out of his contract with the owner of the horse; it was a duty which the smith owed to him alone, and to no one else. And, although the injury to the rider may have happened in consequence of the negligence of the smith, the latter was not bound, either by his contract or by any considerations of public policy or safety, to respond for his breach of duty to any one except the person he contracted with.

This was the ground on which the case of Winterbottom v.

Wright (10 Mees. & Wels. 109) was decided. A. contracted with the postmaster-general to provide a coach to convey the mail bags along a certain line of road, and B. and others also contracted to horse the coach along the same line. B. and his co-contractors hired C., who was the plaintiff, to drive the coach. The coach, in consequence of some latent defect, broke down; the plaintiff was thrown from his seat and lamed. It was held that C. could not maintain an action against A. for the injury thus sustained. The reason of the decision is best stated by Baron Rolfe. A.'s duty to keep the coach in good condition was a duty to the postmaster-general, with whom he made his contract, and not a duty to the driver employed by the owners of the horses.

But the case in hand stands on a different ground. The defendant was a dealer in poisonous drugs. Gilbert was his agent in preparing them for market. The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label. * * * In respect to the wrongful and criminal character of the negligence complained of, this case differs widely from those put by the defendant's counsel. No such imminent danger existed in those cases. In the present case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury therefore was not likely to fall on him, or on his vendee who was also a dealer; but much more likely to be visited on a remote purchaser, as actually happened. The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant, to avoid the creation of that danger by the exercise of greater caution? or that the exercise of that caution was a duty only to his immediate vendee, whose life was not endangered? The defendant's duty arose out of the nature of his business and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labeled into the market; and the defendant is justly responsible for the probable consequences of the act. The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinwall. The wrong done by the defendant was in putting the poison,

mislabeled, into the hands of Aspinwall as an article of merchandise to be sold and afterwards used as the extract of dandelion, by some person then unknown. The owner of a horse and cart who leaves them unattended in the street is liable for any damages which may result from his negligence. (Lynch v. Nurdin, 1 Ad. & Ellis, N. S. 29; Illidge v. Goodwin, 5 Car. & Payne, 190.) The owner of a loaded gun who puts it into the hands of a child by whose indiscretion it is discharged, is liable for the damage occasioned by the discharge. (5 Maule & Sel. 198.) The defendant's contract of sale to Aspinwall does not excuse the wrong done to the plaintiffs. It was a part of the means by which the wrong was effected. The plaintiffs' injury and their remedy would have stood on the same principle, if the defendant had given the belladonna to Dr. Foord without price, under circumstances which would probably have led to its sale on the faith of the label. * * *

Judgment affirmed.

The Duty of the Occupier of Land.

NORWICH v. BREED.

30 Conn. 535. 1862.

[Breed had erected a large building adjoining his residence and requested Willoughby to excavate the ground so as to allow the water from the residence property to drain off. Laborers under Willoughby made an excavation three feet deep near the street line, removed a fence which had stood on the lot line and left the pit without protection. One Sykes, when it was very dark, missed his way, and without negligence fell into the excavation and was severely injured. The excavation was wholly on Breed's land and about four feet from the street line. Sykes sued the city and recovered from it. This is an action for reimbursement by the city against Breed.]

SANFORD, J. * * * Our statute made it the duty of the city to erect and maintain a good and sufficient fence or railing on the side of the street, if it was "so raised above the adjoining ground as to endanger the safety of travelers;" and made it liable to the payment of just damages to anyone

who should suffer in person or property by reason of the want of such railing. * * * By the terms of the statute, the duty of the city, and its consequent liability for neglect, are made to depend entirely upon the question of danger; and it is obvious that that question can seldom if ever be resolved by the consideration of the distance between the street and the excavation alone. Distance is one, and but one of the elements that enter into the calculation. Travelers in the night time need, and the intention of the Legislature was to give them, the protection of a railing against actual, existing danger, whether arising from a pit several feet distant from the line of way, or a few inches only. In both cases, the danger, if not equal in degree, will be almost always equally apparent. And whether danger exists in the particular case or not must be a question of fact, depending upon all of the surrounding circumstances, and one which the jury only can decide.

And as the dangerous character rather than the exact location of the excavation determined the duty and the consequent liability of the city in regard to it, so the duties and liabilities of the defendant in this respect must be determined by the same criterion. His right to make the excavation was undeniable, and was not denied; but he was bound to exercise that right with a due regard to the co-existing rights of the city and of travelers on the street. *Sic utere tuo ut alienum non laedas* is a maxim as universal in its application as it is wise and just in principle.

The defendant had the right to make the excavation and if the fence was his he had the right to remove that also; but having removed the fence and made the excavation, he had no right to leave the pit unguarded until time and opportunity had been afforded to the city to assume and perform the duty thus originated and cast upon it by the defendant's act. Travelers upon the street were at all times entitled to, and had a right to expect, because the law required it, adequate protection against an excavation by reason of which the street became raised above the adjoining ground so as to endanger the travel upon it. The defendant's liability did not arise from the defendant's act in making the excavation, for that he had a right to make. Nor could it depend entirely upon the distance between the excavation and the street, for he had

an abstract right to make it anywhere within the limits of his close; but a due regard to the safety of travelers on the street required that, until the city could furnish such protection as the defendant's acts thus rendered necessary, he should himself discharge that duty. But he neglected it. He left the excavation altogether unguarded and unadvertised, in a condition dangerous to passengers on the adjoining street, and hence his just responsibility for the consequences of that neglect.

Whether the excavation could, with a due regard to the rights of passengers on the street, be left unguarded, or could not, depended upon the question whether, being unguarded, it endangered the travel or not. If it did not, no matter how near it was to the line of way. If it did, no matter how far it was removed. We think the question of the defendant's liability in this respect was placed upon the true ground by the judge's charge. * * *

The judgment for the plaintiff was Affirmed.

Duty to a Trespasser.

HOOKER v. MILLER.

37 Iowa 613. 1873.

BECK, C. J. The defendant was the owner of a vineyard and had lost grapes by trespassers entering his inclosure and carrying them away. To protect his fruit from such persons he planted a spring gun, so arranged that it would be discharged in the direction of one entering his premises, by means of wires or cords, which the trespasser would be likely to come in contact with and disturb. He gave no notice whatever that he had so arranged the gun, or of his intention so to do. The gun being thus placed, and charged with powder and shot, the plaintiff, in the night time, went into the vineyard, without defendant's permission, and received a severe wound from discharging the gun through the arrangement provided for that purpose. The plaintiff testifies that his object in entering the premises was to ask permission of defendant to take some grapes. But it may be considered for the purpose of this case, that he entered with the intention of wrongfully taking the fruit without defendant's permission. * * *

The act of plaintiff in entering defendant's vineyard, in the night time, conceding that it was for the purpose of taking grapes without permission, is a misdemeanor. Acts 12th Gen. Ass., ch. 74, Sec. 2; Code, Sec. 3898. But defendant had no right to prevent or resist the trespass of plaintiff by using means dangerous to life or by inflicting great bodily injury. In doing so he violated the law and became liable for injuries sustained by plaintiff under the doctrine that all injuries inflicted by one while acting in violation of the law will support an action in favor of the injured party against the perpetrator. This court has held that a mere trespass against property other than a dwelling is not a sufficient justification to authorize the use of a deadly weapon by the owner in its defense; and that if death results in such a case it will be murder, though the killing be actually necessary to prevent the trespass. The State v. Vance, 17 Iowa 138.

The rule is based upon the consideration that an act of violence done to prevent trespass, which causes death, is beyond the provocation, and the perpetrator is guilty of murder. If the intention was not to take life, or the act was done in the heat of passion, the offense would be extenuated and become no more than manslaughter.

Under the law at the time of the killing for which defendant was convicted in the case just cited, a trespass of the character of the one committed by the person killed, which was not different from the act of plaintiff in this case, pleaded by defendant as a justification, was not punishable as a misdemeanor. But this fact cannot defeat the application of the rule of the case now. The rule is based not on the light in which the law regards the act and the punishment provided for it. The criminality of the act or the turpitude of the trespasser is not the foundation of the rule. But it is based upon the limitation which the law imposes upon the right of the owner of property in rendering it protection. He cannot prevent a trespass by using means dangerous to life. Now, if the act of the trespasser is punishable as a misdemeanor, that fact does not demand greater violence or more dangerous means to secure protection than if the same act was regarded as a mere trespass and not a crime. In other words, it requires no more violence to protect property from a trespasser, when there is a

statute punishing him criminally, than it would in the absence of such enactment.

The act of defendant, we conclude, upon the authority cited and upon principle, in preparing the means whereby plaintiff's life was endangered and from which he sustained great bodily injury, was unlawful. It follows, in the application of familiar doctrines, which do not demand the support of authority to secure their recognition, that he is liable for the injury inflicted upon plaintiff.

It has been held in England that a trespasser, having notice that spring guns are laid upon the premises, cannot recover, in an action against the owner thereof, for injuries sustained thereby. Slott v. Wilkes, 3 Barn. & Ald. 304. And that when a trespasser, without such notice, is injured in the same way, he may recover in such an action. Bird v. Holbrook, 3 Bing. 628. So the owner of a vicious dog is liable for injuries sustained by a trespasser from being bitten by such dog. Shufey v. Bartley, 4 Sneed 58. In New York the same doctrine with modifications on the side of humanity has been recognized. It has been held there that the nature and value of the property ought to be such as to justify the use of means for its protection which are dangerous to life, and that the trespasser must have full notice of the mischief in order to exempt the owner from liability for injuries inflicted. Loomis v. Terry, 17 Wend. 496.

Whether notice to the trespasser of the dangerous contrivances laid for the protection of property would relieve the owner of liability for injuries caused thereby, we do not determine, as the facts before us do not involve that question, no such defense having been made in this case. The authorities that have come to our notice seem to recognize such a rule.

Judgment for the plaintiff.

Infant Trespassers—Duty as to Turntables.

TURESS v. N. Y. S. & W. R. R. CO.

61 N. J. L. 314, 40 Atl. 614. 1898.

[The defendant controlled and operated a turntable on its land abutting the south side of Ellison street, a public highway in the city of Paterson. The turntable was located five feet

from the street and was not locked or fenced. The plaintiff, aged nearly eleven years, with his playmates got on the table, moved it, and was caught and injured. The defendant demurred to the plaintiff's petition setting forth these facts.]

MAGIE, C. J., delivered the opinion of the court.

The ground upon which the alleged duty of the defendant company is rested, involves the doctrine of the cases which have come to be called "Turntable Cases." The first case of importance in this country upon that subject is Railroad Co. v. Stout, 17 Wall. 657. That case has been followed more or less closely in a great number of cases, which may be found collected in 27 Am. & Eng. Enc. Law, 344. While the doctrine of the United States Supreme Court in the case cited has been adopted by many courts, it has, as we shall see, the dissent and disapprobation of other courts. It is now for the first time presented for consideration to the courts of this state. The rule of duty involved in the doctrine under consideration may be thus generally stated: That a railroad company which maintains on its own ground a turntable, which, from its attractiveness to the eyes of children, or from its being adapted by its construction to provide for children an attractive thing to play upon, is bound to take reasonable care that they be not injured thereby. Sometimes emphasis has been laid upon the fact that the turntable is maintained near public streets and places, or where people and children are accustomed to visit or pass through, as in Ferguson v. Railroad Co., 75 Ga. 637. Sometimes it is stated more broadly, as by Young, J., in Keffe v. Railway Co., 21 Minn. 207, where he says that a railroad company, when it sets before young children a temptation which it has reason to believe will lead them into danger, must use ordinary care to protect them from harm. It is nowhere pretended that the rule applies in the case of adults, who, under similar circumstances, would undoubtedly be trespassers, to whom the railroad company would owe no duty, or at most would be admitted by license or permission, and to them the railroad company would owe no duty but to abstain from willful injuries, and from maintaining hidden and concealed dangers. But the expressed notion is that under such circumstances young children are not trespassers, because allured and tempted to come upon the land of another, and not being

of sufficient age to appreciate the dangers consequent on yielding to such temptation. It is obvious that the principle on which the rule rests, if sound, must be applicable more widely than merely to railroad companies and the turntable maintained by them. It would require a similar rule to be applied to all owners and occupiers of land in respect to any structure, machinery, or implement maintained by them thereon which possesses a like attractiveness and furnishes a like temptation to young children. He who erects a tower capable of being climbed, and maintains thereon a windmill to pump water to his buildings; he who leaves his mowing machine or dangerous agricultural implements in his field after his day's work; he who maintains a pond in which boys may swim in summer or on which they may skate in winter,—would seem to be amenable to this rule of duty. Climbing, playing at work, swimming and skating, are attractions almost irresistible to children, and any landowner or occupier may well believe that such attractions will lead young children into danger. Many other cases of like character might be imagined. In all of them the doctrine of the Turntable Cases, if correct, would charge the landowner or occupier with the duty of taking ordinary care to preserve young children thus tempted on his land from harm. The fact that the doctrine extends to such a variety of cases, and to cases in respect to which the idea of such a duty is novel and startling, raises a strong suspicion of the correctness of the doctrine, and leads us to question it. The only ground upon which this doctrine can be supported, if at all, is that he who maintains on his land a thing having the attractiveness mentioned, is assumed thereby to invite upon his lands children of tender age to whom this attractiveness has proved a temptation too strong to resist, and to know what the conduct of children thus invited would probably be. The duty must arise, in my judgment, from this implied invitation. I use the word "invitation" as aptly expressing a well-known relation between an owner or occupier of land and one who comes thereon under certain circumstances. The nature and extent of the liability of the inviter are well settled. Phillips v. Library Co., 55 N. J. Law 307, 27 Atl. 478. Mr. Justice Depue, in the case last cited, draws attention to a criticism of the master of the rolls in Heaven v. Pender, 11 Q. B. Div. 508, on the accuracy of the word "invitation," as commonly

used in this connection. But the statement which the learned master of the rolls suggested as more accurately expressing the relation between the parties in such cases seems to be unnecessarily and erroneously broad. Invitation is a term whose legal import is known, and there is no reason for not using it to express the relation now under consideration. Invitation which creates such a relation may be express, as when the owner or occupier of land by words invites another to come on it, or make use of it or something thereon; or it may be implied, as when such owner or occupier, by acts or conduct, leads another to believe that the land or something thereon was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier, but is in accordance with the intention or design for which the way or place or thing was adapted and prepared or allowed to be used. This definition, originally given in Sweeny v. Railroad Co., 10 Allen 368, was approved and adopted by our court of errors. Phillips v. Library Co., ubi supra. It will be observed that in the case of an implied invitation the relation is imposed upon the owner or occupier of land only when he has done something which justifies one who enters upon the land and makes use of it or something upon it in believing that he intended such use to be made; and he who makes such use can claim the relation only when he is justified, by the acts or conduct of the owner or occupier, in believing that such use was intended; and entry and use by such invitation is thus distinguished from entry and use by mere permission. Applying these views to the Turntable Cases, it is obvious that the relation between a railroad company and a child who enters its lands to play with a turntable is not one created by implied invitation. A turntable, however attractive, could not be deemed to have been erected for the use which the child makes of it. This objection is not obviated by an appeal to the doctrine that children of tender years are not held to the same degree of prudence and care as adults, but only to such prudence and care as their years indicate them to possess; for it is not (yet) a question of the child's negligence, but a question of the duty of the railroad company towards the child. If that duty is conceived to arise from the relation created by implied invitation, it must appear that the child is justified in believing that the turntable was designed for the use he makes of it; which is, of course, absurd.

In my judgment, it follows that the liability of a railroad company to a child injured by playing on its turntable cannot arise out of a duty imposed on the company by reason of a supposed implied invitation. If a child is not to be deemed invited to enter a railroad company's land to play upon a turntable, it also follows that a child in doing so is either a trespasser or is there by mere permission. In neither case is any duty cast upon the landowner, except to abstain from willful injury, and from maintaining hidden or concealed dangers.

* * * It results that the declaration demurred to discloses the existence of no duty owing by the defendant company to the plaintiff, the neglect of which caused the injury for which he sues, and that, therefore, the judgment of the Circuit Court should be affirmed, with costs.

Duty to Licensees.

GAUTRET, ADMINISTRATRIX v. EGERTON.

L. R., 2 C. P. 371 (Eng.).

[The declaration in the first of these actions stated that the defendants were possessed of a close of land, and of a certain canal and cuttings intersecting the same, and of certain bridges across the said canal and cuttings, communicating with and leading to certain docks of the defendants, which said land and bridges had been and were from time to time used with the consent and permission of the defendants by persons proceeding towards and coming from the said docks; that the defendants, well knowing the premises, wrongfully, negligently, and improperly kept and maintained the said land, canal, cuttings, and bridges, and suffered them to continue and be in so improper a state and condition as to render them dangerous and unsafe for persons lawfully passing along and over the said land and bridges towards the said docks, and using the same as aforesaid; and that Leon Gautret, whilst he was lawfully in and passing and walking along the said close and over the said bridge, and using the same in the manner and for the purpose aforesaid, by and through the said wrongful, negligent, and improper conduct of the defendants as aforesaid, fell into one of the said cuttings of the defendants, intersecting the said close as aforesaid, and

thereby lost his life within twelve calendar months next before the suit; and the plaintiff, as administratrix, for the benefit of herself, the widow of the said Leon Gautret, and A. Gautret, &c., according to the statute in such case made and provided, claimed £2500.

The defendants demurred to the declaration, on the ground that "it does not appear that there was any legal duty or obligation on the part of the defendants to take means for preventing the said land, &c., being dangerous and unsafe." Joinder.]

WILLES, J. I am of opinion that our judgment must be for the defendants in each of these cases. * * * It is not enough to show that the defendant has been guilty of negligence, without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others. All that these declarations allege is, that the defendants were possessed of land, and of a canal and cuttings intersecting the same, and of certain bridges across the canal and cuttings communicating with and leading to certain docks of theirs; that they allowed persons going to and from the docks, whether upon the business or for the profit of the defendants or not, to pass over the land, and that the deceased persons, in pursuance of and using that permission, fell into one of the cuttings, and so met their deaths. The consequences of these accidents are sought to be visited upon these defendants, because they have allowed persons to go over their land, not alleging it to have been upon the business or for the benefit of the defendants, or as the servants or agents of the defendants; nor alleging that the defendants have been guilty of any wrongful act, such as digging a trench on the land, or misrepresenting its condition, or anything equivalent to laying a trap for the unwary passengers; but simply because they permitted these persons to use a way with the condition of which, for anything that appears, those who suffered the injury were perfectly well acquainted. * * * Assuming that these were private docks, the private property of the defendants, and that they permitted persons going to or coming from the docks, whether for their own benefit or that of the defendants, to use the way, the dedication of a permission to use the way must be taken to be in the character of a gift. The principle of law as to gifts is, that the giver is not respon-

sible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time, and omitted to caution the donee. There must be something like fraud on the part of the giver before he can be made answerable. It is quite consistent with the declarations in these cases that this land was in the same state at the time of the accident that it was in at the time the permission to use it was originally given. To create a cause of action, something like fraud must be shown. No action will lie against a spiteful man who, seeing another running into a position of danger, merely omits to warn him. To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty: otherwise, a man who allows strangers to roam over his property would be held to be answerable for not protecting them against any danger which they might encounter whilst using the license. Every man is bound not wilfully to deceive others, or do any act which may place them in danger. It may be * * * that he is responsible if he puts an obstruction on the way which is likely to cause injury to those who by his permission use the way: but I cannot conceive that he could incur any responsibility merely by reason of his allowing the way to be out of repair. For these reasons, I think these declarations disclose no cause of action against the defendants, and that the latter are therefore entitled to judgment. * * *

Judgment accordingly.

The Breach of Duty to Use Care—Negligent Breach—Willful Breach.

GEORGIA PACIFIC RY. CO. v. LEE.

92 Ala. 262, 9 So. 230. 1890.

[This was an action for an injury to a wagon and team by collision with a train of the defendant at a city railroad crossing. The evidence was conflicting as to whether the driver stopped to listen or whether he heedlessly drove across the tracks, and also as to the warnings given by the train-crew and the speed of the train. The defendant pleaded absence of negligence on its own part and contributory negligence on the part of the plaintiff. The jury found for the plaintiff.]

McCLELLAN, J. * * *

If the jury believed that part of the testimony in this regard which is most favorable to the defendant, their conclusion that the driver was guilty of contributory negligence necessarily resulted. And they might have reached the same conclusion,—it was open to them to do so,—even on the plaintiff's evidence. So finding, they should have returned a verdict for the defendant, unless its employes were guilty of such gross negligence, such recklessness or wantonness, as is the legal equivalent of willful or intentional wrong. Many of the rulings of the trial court in defining the gross negligence, recklessness, or wantonness on the part of the defendant which will authorize recovery, notwithstanding plaintiff's contributory negligence, are presented for review. The fault in the court's definitions in this regard lies, in our opinion, in the assumption that recklessness or wantonness, implying willful and intentional wrong-doing, may be predicated of a mere omission of duty, under circumstances which do not of themselves impute to the person so failing to discharge the duty a sense of the probable consequences of the omission. The charges given by the court in this connection, and its rulings on charges requested by the defendant, proceed on the theory that a mere failure on the part of defendant's employes to see plaintiff's wagon and team, as soon as they might have seen them by the exercise of due care, was such recklessness or wantonness as implies a willingness or a purpose on their part to inflict the injury complained of. We do not think this proposition can be maintained either logically or upon the authorities. The failure to keep a lookout, which it was the duty of defendant's employes to maintain, and which would have sooner disclosed the peril of the driver and plaintiff's wagon and team,—even conceding that such would have been the case,—was, at the most, mere negligence, inattention, inadvertence; and it cannot be conceived, in the nature of things, how a purpose to accomplish a given result can be imputed to mental conditions the very essence of which is the absence of all thought on the particular subject. To say that one intends a result which springs solely from his mind, not addressing itself to the factors which conduce to it, to imply a purpose to do a thing from inadvertence in respect of it, are contradictions in terms.

Willful and intentional wrong, a willingness to inflict injury, cannot be imputed to one who is without consciousness, from whatever cause, that his conduct will inevitably or probably lead to wrong and injury. In the case at bar this consciousness could not exist on the part of defendant's employes until they knew plaintiff's wagon and team were in a position of danger; and no degree of ignorance on their part of this state of things, however reprehensible in itself, could supply this element of conscious wrong, or reckless indifference to consequences, which from their point of view would probably or necessarily ensue.

The true doctrine, and that supported by many decisions of this court, as well as the great weight of authority in other jurisdictions, is that, notwithstanding plaintiff's contributory negligence, he may yet recover if, in a case like this, the defendant's employes discover the perilous situation in time to prevent disaster, by the exercise of due care and diligence, and fail, after the peril of plaintiff's property becomes known to them as a fact, and not merely after they should have known it, to resort to all reasonable effort to avoid the injury. Such failure, with such knowledge of the situation, and the probable consequences of the omission to act upon the dictates of prudence and diligence, to the end of neutralizing plaintiff's fault, and averting disaster notwithstanding his lack of care, is, strictly speaking, not negligence at all, though the term "gross negligence" has been so frequently used as defining it that it is perhaps too late, if otherwise desirable, to eradicate what is said to be an unscientific definition, if not, indeed, a misnomer; but it is more than any degree of negligence, inattention, or inadvertence,—which can never mean other than the omission of action without intent, existing or imputed, to commit wrong; it is that recklessness, or wantonness, or worse, which implies a willingness to inflict the impending injury, or a willfulness in pursuing a course of conduct which will naturally or probably result in disaster, or an intent to perpetrate a wrong. The theory of contributory negligence, as a defense, is that, conjointly with negligence on the part of the defendant, it conduces to the damnifying result, and defeats any action the *gravamen* of which is such negligence. If defendant's conduct is not merely negligent, but worse, there is nothing for plaintiff's want of care to contribute to; there is

no lack of mere prudence and diligence of like kind on the part of defendant to conjunctively constitute the efficient cause. Mere negligence on the one hand cannot be said to aid willfulness on the other. And hence such negligence of a plaintiff is no defense against the consequences of the willfulness of the defendant. But nothing short of the elements of actual knowledge of the situation on the part of defendant's employes, and their omission of preventive effort after that knowledge is brought home to them, when there is reasonable prospect that such effort will avail, will suffice to avoid the defense of contributory negligence on the part of, or imputable to, the plaintiff. * * *

Certain other rulings are to the effect that, if the jury found that the train which inflicted the injury, if injury was inflicted, etc., was being run by defendant's servants in a recklessly negligent manner, and that the injury proximately resulted therefrom, recovery might be had, notwithstanding plaintiff's contributory negligence, and notwithstanding defendant's employes used all means in their power to avert the injury after the peril became manifest to them. It is true there is what may be termed a "shading" of the doctrine we have been considering, to the effect that to run a train at a high rate of speed, and without signals of approach, at a point where the trainmen have reason to believe there are persons in exposed positions on the track, as over an unguarded crossing in a populous district of a city, or where the public are wont to pass on the track with such frequency and in such numbers,—facts known to those in charge of the train,—as that they will be held to a knowledge of the probable consequences of maintaining great speed without warnings, so as to impute to them reckless indifference in respect thereto, would render their employer liable for injuries resulting therefrom, notwithstanding there was negligence on the part of those injured, and no fault on the part of the servants after seeing the danger.

The doctrine is not based on the idea that they ought to have sooner observed the danger, however, but on the ground that they knew of its existence,—of the presence of people in positions of peril,—as a matter of fact, without seeing them at all in the particular instance. We fully subscribe to this doctrine, but deny its application in the case at bar. * * *

Reversed.

Nonfeasance and Misfeasance.

SOUTHERN RY. v. GRIZZLE.

124 Ga. 735, 53 S. E. 244. 1905.

[The plaintiff was the widow of a man who was struck while crossing a railroad track. She alleged that his view was obstructed by warehouses, that the engineer failed to ring a bell, sound a whistle or check the speed of his train, and that the requirements of the blow-post law were disregarded by him. The engineer, O'Neal, is made a party defendant.]

COBB, P. J. An agent is not ordinarily liable to third persons for mere nonfeasance. Kimbrough v. Boswell, 119 Ga. 201, 45 S. E. 977. An agent is, however, liable to third persons for misfeasance. Nonfeasance is the total omission or failure of the agent to enter upon the performance of some distinct duty or undertaking which he has agreed with his principal to do. Misfeasance means the improper doing of an act which the agent might lawfully do; or, in other words, it is the performing of his duty to his principal in such a manner as to infringe upon the rights and privileges of third persons. Where an agent fails to use reasonable care and diligence in the performance of his duty, he will be personally responsible to a third person who is injured by such misfeasance. The agent's liability in such cases is not based upon the ground of his agency, but upon the ground that he is a wrongdoer, and as such he is responsible for any injury he may cause. When once he enters upon the performance of his contract with his principal, and in doing so omits, or fails to take reasonable care in the commission of, some act which he should do in its performance, whereby some third person is injured, he is responsible therefor to the same extent as if he had committed the wrong in his own behalf. See 2 Clark & Skyles on Agency, 1297 et seq.

Misfeasance may involve also to some extent the idea of not doing, as where an agent engaged in the performance of his undertaking does not do something which it is his duty to do under the circumstances, or does not take that precaution, or does not exercise that care, which a due regard to the rights of others requires. All this is not doing, but it is not the not doing

of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation. Mechem on Agency, § 572. As was said by Gray, C. J., in Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 439: "If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequences of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance or doing nothing, but it is misfeasance, doing improperly." In that case the agent was held liable by the fall of a tackle block and chains from an iron rail suspended from the ceiling of a room, which fell, for the reason that the agent had suffered them to remain in such a manner and so unprotected that they fell upon and injured the plaintiff. In Bell v. Josselyn, 3 Gray 309, 63 Am. Dec. 742, Metcalf, J., said: "Assuming that he was a mere agent, yet the injury for which this action was brought was not caused by his nonfeasance, but by his misfeasance. Nonfeasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do. The defendant's omission to examine the state of the pipes * * * before causing the water to be let on was a nonfeasance. But if he had not caused the water to be let on, that nonfeasance would not have injured the plaintiff."

In the present case the failure of the engineer to comply with the requirements of the blow-post law was not doing, but the running of the train over the crossing at a high rate of speed without giving the signals required by law was a positive act, and the violation of a duty which both the engineer and the railroad company owed to travelers upon the highway. The engineer having once undertaken in behalf of the principal to run the train, it was incumbent upon him to run it in the manner prescribed by law; and a failure to comply with the law, although it involved an act of omission, was not an act of mere nonfea-

sance, but was an act of misfeasance. This view is strengthened by the fact that the blow-post law renders the engineer indictable for failure to comply with its provisions. The allegations of the petition were therefore sufficient to charge O'Neal with a positive tort, for which the plaintiff would be entitled to bring her action against him. * * *

Judgment affirmed.

Degrees of Negligence—Degrees of Care.

HILL v. GLENWOOD.

124 Iowa 479, 100 N. W. 522. 1904.

WEAVER, J. The plaintiff claims to have been injured upon one of the public walks of the city of Glenwood, and that such injury was occasioned by reason of the negligence of the city in the maintenance of the walk at the place of the accident, and without fault on his own part contributing thereto. From verdict and judgment in his favor for $665, the city appeals. In this court the appellant makes no claim that the city was not negligent, but a reversal is sought on other grounds.

* * * * * * * * *

It was shown without dispute that plaintiff had been blind for many years, and this fact is the basis of the criticism upon the charge given to the jury. In the third paragraph of the charge, the court, defining negligence, said: "(3) Negligence is defined to be the want of ordinary care; that is, such care as an ordinary prudent person would exercise under like circumstances. There is no precise definition of ordinary care, but it may be said that it is such care as an ordinarily prudent person would exercise under like circumstances, and should be proportioned to the danger and peril reasonable to be apprehended from a lack of proper prudence. This rule applies alike to both parties to this action, and may be used in determining whether either was negligent." In the eighth paragraph, referring to the plaintiff's duty to exercise care for his own safety, the following language is used: "(8) It must also appear from the evidence that the plaintiff did not in any way contribute to the happening of the accident in question by any negligence on his part; that is, by his own want of ordinary care. The plaintiff,

on his part, was under obligation to use ordinary care to prevent injury when passing over any sidewalk; and if he failed so to do, and his failure in any way contributed to the happening of the accident in question, then he cannot recover herein. The evidence shows without dispute that he was blind, and this fact should be considered by you in determining what ordinary care on his part would require when he was attempting to pass over one of the sidewalks of this city." Counsel for appellant does not deny that the rules here laid down would be a correct statement of the law of negligence and contributory negligence as applied to the ordinary case of sidewalk accident, but it is urged that the conceded fact of plaintiff's blindness made it the duty of the court to say to the jury that a blind person who attempts to use the public street "must exercise a higher degree of care and caution than a person ordinarily would be expected or required to use had he full possession of his sense of sight." We cannot give this proposition our assent. It is too well established to require argument or citation of authority that the care which the city is bound to exercise in the maintenance of its streets is ordinary and reasonable care, the care which ordinarily marks the conduct of a person of average prudence and foresight. So, too, it is equally well settled that the care which a person using the street is bound to exercise on his own part to discover danger and avoid accident and injury is of precisely the same character, the ordinary and reasonable care of a person of average prudence and foresight. The streets are for the use of the general public without discrimination; for the weak, the lame, the halt and the blind, as well as for those possessing perfect health, strength, and vision. The law casts upon one no greater burden of care than upon the other. It is true, however, that in determining what is reasonable or ordinary care we must look to the circumstances and surroundings of each particular case. As said by us in Graham v. Oxford, 105 Iowa 708, 75 N. W. 474: "There is no fixed rule for determining what is ordinary care applicable to all cases, but each case must be determined according to its own facts." In the case before us the plaintiff's blindness is simply one of the facts which the jury must give consideration in finding whether he did or did not act with the care which a reasonably prudent man would ordinarily exercise when burdened by such infirmity. In other words, the measures which a

traveler upon the street must employ for his own protection depend upon the nature and extent of the peril to which he knows, or in the exercise of reasonable prudence ought to know, he is exposed. The greater and more imminent the risk, the more he is required to look out for and guard against injury to himself; but the care thus exercised is neither more nor less than ordinary care—the care which men of ordinary prudence and experience may reasonably be expected to exercise under like circumstances. See cases cited in 21 A. & E. Enc. Law (2d Ed.) 465, note 1. In the case at bar the plaintiff was rightfully upon the street, and if he was injured by reason of the negligence of the city, and without contributory negligence on his part, he was entitled to a verdict. In determining whether he did exercise due care it was proper for the jury, as we have already indicated, to consider his blindness, and in view of that condition, and all the surrounding facts and circumstances, find whether he exercised ordinary care and prudence. If he did, he was not guilty of contributory negligence.

* * * * * * * * *

The judgment of the district court is Affirmed.

Standard of Care of Minors.

PARKER v. WASHINGTON ELECTRIC ST. RY. CO.

207 Pa. 438, 56 Atl. 1001. 1904.

FELL, J. The plaintiff, a boy seven years and eight months old, unaccompanied by any one, was received as a passenger on one of the defendant's cars. Soon afterward the conductor, in pursuance of a regulation of the company, left the car in charge of the motorman, who had the entire management of it over a part of the line on which the travel was light. After the conductor had left the car, the plaintiff opened the front door, and went out on the platform to tell the motorman where he wanted to get off. He remained on the platform, with the motorman's knowledge, and without objection or warning, while the car ran a distance estimated by one witness as 1,000 yards, and by another as half a mile. When near the crossing where he wished to get off, the plaintiff stepped down on the step, and held fast to the railing. As the car passed the crossing, he either stepped

or jumped off, and was injured. The court left it to the jury to find whether the motorman was negligent in permitting the boy to ride on the front platform, but declined to submit the question of the plaintiff's contributory negligence.

The measure of a child's responsibility for contributory negligence is his capacity to understand and avoid danger. In analogy to the common-law rule of responsibility for crimes committed, a child under seven years of age has been conclusively presumed to be incapable of appreciating and guarding against danger; and after seven the presumption of incapacity, although not irrebuttable, and growing less strong with each year, continues until fourteen, when the presumption of capacity arises. But these are only convenient points in the uncertain line between capacity and incapacity, at which the law changes the presumption. The standard of responsibility is the average capacity of others of the same age and experience, and to this standard a child should be held, in the absence of evidence on the subject. Kehler v. Schwenk, 144 Pa. 348, 22 Atl. 910, 13 L. R. A. 374, 27 Am. St. Rep. 633. It follows that as responsibility depends upon the knowledge and experience of the child, and on the character of the danger to which he is exposed, generally the question is one for the jury, and not for the court. This must always be so when the facts are in dispute, or the inferences to be drawn from them are doubtful. But in clear cases, where the facts are settled, and there can be no reasonable doubt as to the inferences to be drawn, the question may be determined by the court as matter of law. In Taylor v. Hudson & Delaware Canal Co., 113 Pa. 162, 8 Atl. 43, 57 Am. Rep. 446, a girl eight years of age, following a footpath which passed diagonally across the tracks of a railroad, stepped in front of a train standing on a switch and was struck by a locomotive on the main track, of the approach of which she was not aware. It was held that, because of her age, she could not be charged with negligence, and that the question of contributory negligence did not arise in the case. In Nagle v. Allegheny Valley Railroad Co., 88 Pa. 35, 32 Am. Rep. 413, it was held that the presumption that a boy of fourteen knew and could avoid the danger of crossing a railroad track would prevail, and that, in the absence of evidence of the want of such intelligence and discretion as is usual in those of his age, there could be no recovery for his death.

It may safely be said that the danger to which the jury found that the plaintiff was negligently exposed was not one that the average boy under eight years of age would understand. He could be held only to the standard of intelligence and caution of a boy of that age. The presumption in his favor was strengthened by the only evidence on the subject—elicited on cross-examination—that he did not know that there was any danger in riding on the front platform of the car. There was testimony by the defendant that the plaintiff had been seen by the conductor standing on the platform, and had been sent into the car. This testimony did not show that the plaintiff had perversely and persistently disobeyed a proper direction, and disregarded a danger of which he had been warned. No explanation accompanied the direction, and it was promptly obeyed. After the conductor had left the car the plaintiff went onto the platform for a proper purpose—to tell the motorman where he wished to get off—and he remained there with the motorman's tacit consent.

The judgment is Affirmed.

CHAPTER III.

CONTRIBUTORY NEGLIGENCE.

"Last Clear Chance" Rule.

DAVIES v. MANN.

10 M. & W. 546 (Eng.). 1842.

[Case for negligence. * * *

At the trial, before Erskine, J., at the last Summer Assizes for the county of Worcester, it appeared that the plaintiff, having fettered the fore feet of an ass belonging to him, turned it into a public highway, and at the time in question the ass was grazing on the off side of a road about eight yards wide, when the defendant's wagon, with a team of three horses, coming down a slight descent, at what the witness termed a smartish pace, ran against the ass, knocked it down, and the wheels passing over it, it died soon after. The ass was fettered at the time, and it was proved that the driver of the wagon was some little distance behind the horses.

The learned Judge told the jury, that though the act of the plaintiff, in leaving the donkey on the highway so fettered as to prevent his getting out of the way of carriages traveling along it, might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable against the defendant; and his Lordship directed them, if they thought that the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff. The jury found their verdict for the plaintiff, damages 40s.

Godson now moved for a new trial, on the ground of misdirection. * * *]

LORD ABINGER, C. B. I am of opinion that there ought to be no rule in this case. The defendant has not denied that the ass was lawfully in the highway, and therefore we must assume it to

have been lawfully there; but even were it otherwise, it would have made no difference, for as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there.

PARKE, B. This subject was fully considered by this Court in the case of Bridge v. The Grand Junction Railway Company, 3 M. & W. 246, where, as appears to me, the correct rule is laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence. I am reported to have said in that case, and I believe quite correctly, that "the rule of law is laid down with perfect correctness in the case of Butterfield v. Forrester, that, although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong."

In that case of Bridge v. The Grand Junction Railway Company, there was a plea imputing negligence on both sides; here it is otherwise; and the Judge simply told the jury, that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway, was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that, if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast, or, which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road.

Gurney, B., and Rolfe, B., concurred.

Rule refused.

Contributory Negligence—Circumstances Determining Care.

PENNSYLVANIA R. R. CO. v. LANGENDORF.

48 Oh. St. 316, 28 N. E. 172. 1891.

BRADBURY, J. The defendant in error, in June, 1885, while passing along one of the streets in East Toledo, stopped at a point where the track of the railway of plaintiff in error crossed the street, and engaged in conversation with a woman who had in charge two children, one an infant in arms, the other a girl about four years old. The plaintiff in error had constructed a safety-gate at this point, and during the greater part of the day kept there a watchman to close the same when trains were approaching, as a warning to travelers. The accident that caused the injury occurred about 7 o'clock in the evening, or a little later, but while it was yet light. The watchman had finished his day's labor, and gone away, and the gate was raised (or open), though the street was, perhaps, as extensively used at that hour as at any other part of the day. A local freight train was past due, and approaching at a higher rate of speed than that prescribed by the ordinances of the city. The defendant in error and the nurse were engaged in conversation at a point from which the approaching train was in view for a considerable distance, though exactly how far away it could be seen is left in some doubt. The little girl, while her nurse and defendant in error were conversing, wandered across the railroad track, and, seeing or hearing the approaching train, became excited by the sight or noise or both, and by clapping her hands and other manifestations of surprise and delight, attracted the attention of her nurse certainly, and, probably, that of the defendant in error also. The nurse excitedly called the child to her, and while crossing the railroad track in obedience to the call it tripped and fell in front of the rapidly approaching train, whereupon the defendant in error, observing its imminent peril, sprang to its rescue, caught it in his arms, and leaped onward, but was struck by the locomotive before he could pass beyond its reach, and received the injuries of which he complains.

* * * * * * * * *

Plaintiff in error contends that it was negligence per se for the defendant in error to throw himself in front of a moving train

in his effort to rescue the child from danger. The petition of the plaintiff below discloses that he received the injury of which he complained by voluntarily passing in front of a moving train to rescue a child who had fallen in front of it; therefore, if such an act is negligence per se, the petition disclosed that the negligence of the plaintiff below contributed to the injury, and he was not entitled to maintain an action therefor.

* * * * * * * * *

Plaintiff in error insists that the court of common pleas, instead of leaving the question, as it did, to the jury, to say whether the act of the defendant in error, under all the circumstances, and according to the rules laid down by the court, was or was not negligent, should have told them that to pass in front of a rapidly moving train, as it was admitted the defendant in error did, even to rescue from danger a child of tender years, was in law an act of negligence that defeated his right of recovery. It is said that the defendant in error voluntarily assumed the risk, that the danger attending his act was apparent; and that, however commendable his conduct may have been when viewed from the standpoint of humanity, the law will grant no relief for an injury thus brought upon himself. It is apparent that the defendant in error was under no legal obligation to rescue the child. If he had chosen to stand by and permit the approaching train to run over and kill the child, he would have violated no rule of law, civil or criminal. Therefore what he did in the matter was a voluntary act in the sense of that term that he was under no legal obligation to perform it. That, however, is not a conclusive test of the question. To entitle one to relief for the consequences of the negligence of another, it is by no means necessary that the party injured should have been at the time in the discharge of any duty whatever. His rights in this respect are perfect when he is in the performance of any lawful act, and even, in some instances and in some states, when the act is in some respects not strictly lawful. The act of the defendant in error was not only lawful, but it was highly commendable; nor was he in any legal sense responsible for the emergency that called for such prompt decision and rapid execution. The negligence of the railroad company in having no watchman at this public crossing, and the unlawful rate of speed at which the train was running

towards it, to which may, perhaps, be added that of the nurse in charge of the child, were the causes of its extreme danger. There was but the fraction of a minute in which to resolve and act, or action would come too late. Under these circumstances it would be unreasonable to require a deliberate judgment from one in a position to afford relief. To require one so situated to stop and weigh the danger to himself of an attempt to rescue another, and compare it with that overhanging the person to be rescued, would be in effect to deny the right of rescue altogether if the danger was imminent. The attendant circumstances must be regarded; the alarm, the excitement, and confusion usually present on such occasions; the uncertainty as to the proper move to be made; the promptness required; and the liability to mistake as to what is best to be done suggests that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies. And the doctrine that one who, under those or similar circumstances, springs to the rescue of another, thereby encountering even great danger to himself, is guilty of negligence per se, is neither supported by principle nor authority.

* * * * * * * * * *

In Eckert v. Railway Co., 43 N. Y. 502, it was held that "the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under circumstances constituting rashness in the judgment of prudent persons." In that case the rescuer lost his life in throwing a small child from the track of an approaching train, and a judgment in favor of his administrator for damages resulting from his death was affirmed by the court of appeals. The resemblance between that case and the one before us is very striking.

We think the court of common pleas did not err in leaving it to the jury to determine from all the circumstances surrounding the defendant in error at the time he sprang to the rescue whether the act was rash or not, and in saying to them that, if they found it was not rash, then it did not constitute contributory negligence. It is difficult, if not impossible, to lay down in advance a rule by which to determine the extent to which one may risk his safety or his life in emergencies of this character, and not be charged with rashness; but the emergency may be such as to warrant the assumption of a high degree of risk, and one so situated may

rightfully expect his acts to be construed in the light afforded by all the circumstances that impelled him to their commission, and that he would not be charged with contributing to his own injury, so as to defeat a right of action, because the result showed that the risk he assumed was greater than in the excitement of the moment he had contemplated, or in some other respect his judgment had been faulty.

Judgment for the plaintiff Affirmed.

SALMON v. DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

38 N. J. L. 5. 1875.

[* * * The plaintiff set forth that the defendant railway company had neglected to keep its right of way free from combustible material, that cinders falling from the locomotives had set fire to this material, and that the fire had spread to the plaintiff's property and destroyed it. The court held on demurrer to certain counts in the declaration, that the company owed this duty. The defendant set up by plea to other counts that the plaintiff's land was covered by trees bearing leaves which the plaintiff allowed to lie and which on being blown by the wind formed a continuous combustible line of material over to the defendant's property and that the plaintiff was therefore contributorily negligent.]

BEASLEY, C. J. * * * This plea, it is manifest, demands for its support the concession, that the law requires a man to alter the natural conditions of his property, and to control, in some degree, the operation of the laws of nature with respect to such property, in favor of the owner of the adjacent lands. But this concession, I think, cannot be made. In the absence of special legislation, a man does not become a wrongdoer by leaving his property in a state of nature. If water falls from the clouds upon its surface, the owner is not obliged to counteract the law of gravity in order to prevent such water from flowing onto the adjacent land; or if the soil becomes disintegrated by the action of the heat, he is under no duty to prevent the dust thence arising from being carried through the air into the house of his neighbor. Such results are purely

sequences of natural causes, and, like all other effects of the vis major, must be submitted to; they cannot, in themselves, form any ground for a legal complaint. When this plea, therefore, attempts to fashion a wrong out of such matters, the very essence of legal liability, in this department of torts, is overlooked. Legal negligence does not consist simply of an omission to do that which would have prevented the infliction of damage on another, but, in addition to this, it involves a breach of duty. Mr. Wharton, in his complete and carefully considered definition of negligence, in its civil relations, says it "is such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as immediately produces, in an ordinary and natural sequence, a damage to another." Law of Neg., § 2. This plea charges that the plaintiff did not prevent the leaves falling from his trees, from being carried by the wind to the land of the defendant, but it altogether fails to show that he was under any legal obligation so to do. If the law annexed such a condition as that to the ownership of land, an action would lie for every leaf that should be blown by the wind from the trees upon such land to the neighboring property. But there is no such obligation known to the law. All land is subject to the servitude of receiving the leaves brought to it in the course of nature, and, as a compensation, can dispose of its own leaves in the same manner. The consequence is, there was no negligence in the plaintiff's allowing the leaves in question to be carried to the roadway of the defendant, and that being so, it follows that, being on the land of the defendant rightfully, it became its duty to remove them when it desired to use fire on its land under dangerous conditions.

Under the force of the principles thus adopted, it becomes also manifest that the plaintiff is not chargeable with any legal neglect from leaving fallen leaves, the product of the trees, on his own land. It was his right to leave them there. A person is not called on to anticipate negligence on the part of another, and, by way of prevention, to make provision against its effects. The fire in question, upon the facts stated in these pleadings, was caused solely by the illegal act of the defendant, and there is no provision of law which required the plaintiff to foresee the doing of such an act, and to put his own land in a situation to withstand its effect. He owed no duty to the defendant in this

respect, and, consequently, negligence, in the legal sense, cannot be imputed to him. It never would be thought that a person owning land in the vicinity of a canal was bound to raise embankments around such property, to guard against its overflow from water escaping by negligence from such artificial aqueduct, and yet the contention for the existence of such an obligation would be quite as tenable as is the claim that the present plaintiff was bound to put his property in a condition to withstand a fire proceeding from the heedlessness of the defendant. I am aware that it has been ruled in Illinois, that the owners of lands contiguous to railroads are as much bound to keep their lands free from dry grass and weeds as the railroad company is on its roadway, but I regard such cases as opposed to well settled legal principles. Ohio and M. R. R. Co. v. Shanefelt, 47 Ill. 497. * * * If this is the doctrine of the law, it is, I think, entirely manifest that the long line of decisions on the subject of the careless use of fire by a proprietor, on his own property, which we find in the books, have been rendered in utter disregard to this important condition.

The ruling of the courts has invariably been, that every proprietor is responsible for the ordinary and natural consequences of the careless use of fire on his own premises, and this without the least reference to the condition of the adjacent lands, to which the conflagration has spread. No support, in any of these authorities, can be found for the assumption, that if a land-owner places his stacks of grain or hay on the confines of his land, that thereby, in a legal point of view, he becomes a contributor to a fire occasioned by negligence on the land of his neighbor. By such an act, it is true, he takes the risk of the consequences of an accidental fire on the contiguous premises, but not of a neglect which he can be called upon neither to anticipate nor to guard against.

In the leading cases in Illinois it is assumed, that the same duty which will compel the railway company to clear its roadway of combustibles, imposes an equal obligation on the owner of the contiguous land, but the distinction between the cases is obvious; the company uses a dangerous agent, and must provide proper safeguards; the land-owner does nothing of the kind, and has a right to remain quiescent.

The plaintiff should have judgment.

Contributory Illegal Conduct.

NORRIS v. LITCHFIELD.

35 N. H. 271. 1857.

[Case, for damages to the plaintiff's horse, carriage and harness, by the insufficiency of a bridge in a public highway in said Litchfield, for want of sufficient width and suitable railing.

The evidence tended to show that one Bixby, with two ladies, was traveling on said highway with a horse and chaise, in a very dark evening; that when near the bridge in question he heard a carriage approaching from the other direction; he called out to the person approaching to stop, and turned out as he supposed as far as was safe and prudent. One Moor was in charge of the carriage approaching, which was a single lumber wagon, and was walking behind the wagon attending to his freight, and did not notice the approach of Mr. Bixby's carriage, or hear him call out. Moor's horse turned to the right, so as to strike the fence on the westerly side, before he got upon the bridge, and then proceeded across the bridge before Moor was able to take hold of or stop him. The carriages came in collision before Moor's horse had reached the bridge, by some fifteen or eighteen feet; and the chaise, with Bixby and the ladies, was either drawn back by Moor's horse and wagon, or backed by Bixby, in endeavoring to extricate his carriage from the other, and precipitated backwards from the bridge on the easterly side, a height of about nine feet, by which the horse was instantly killed, and the chaise injured.

The horse and chaise were the property of the plaintiff, who was a stable keeper, and had let them to Bixby.

The highway at the end of the bridge was about eighteen or nineteen feet in width, where the collision probably occurred, and the wheel tracks of the traveled part of the road were within three or four feet of the fence struck by Moor's wagon. There was no railing on the easterly side of the highway, where the road was raised by an embankment, and no railing or other barrier, except a small log upon the easterly side of the bridge, which was of plank, eighteen feet long, across the highway.

* * * * * * * * *

The defendants further asked the court to instruct the jury that if they believed that if Bixby had given to Moor his legal

rights, no accident would have happened, then the defendants would not be liable.

The court declined to so instruct, but charged on this point, that where some accident occurs, which ordinary care and prudence could not prevent, and a defect exists in the highway by means of which the damage occurs, and without which it would not have occurred, the town is liable; that if the plaintiff's carriage was in the middle of the traveled part of the road, his agent using ordinary care, skill and prudence, considering the circumstances, and came in collision with another carriage, this would be an accident for which the agent of the plaintiff would not be in fault, so far as this case is concerned; and if such accident led to this damage by a defect in the highway, the town is liable.

The jury rendered a verdict for the plaintiff, which the defendant moves to set aside, and for a new trial, because of the refusal and charge of the court, above stated. * * *]

BELL, J. The question arising upon the instructions asked, as well as those given to the jury, is whether a traveler can recover against a town for damages sustained from a defect of a highway, if at the time of the accident he is trespassing on the rights of others, or violating a law of the State. * * *

In actions of this kind it is settled that if the damage sustained had been in any degree directly caused by his own fault or negligence, the plaintiff cannot recover against the town. * * * But the idea of the defendant's counsel was, that if the plaintiff was himself a wrong-doer, he could maintain no action whatever, however prudent and careful he may have been. * * *

But we are unable to agree to the doctrine thus broadly laid down. As a general principle it seems to us wholly immaterial, whether, in the abstract, the plaintiff was a wrong-doer or a trespasser, or was acting in violation of law. For his wrong or trespass he is answerable in damages, and he may be punishable for his violation of law; but his rights as to other persons, and as to other transactions, are not affected by that circumstance. A traveler may be riding with a horse or carriage which he had no right to take or use; he may be traveling on a turnpike without payment of toll; he may be riding on a day when riding is forbidden, or with a speed forbidden by law, or upon what is called

the wrong side of the road; or his team may be standing in the street of a town, without his attending by them and keeping them under his command, as the law requires; and in none of these cases is his right of action for any injury he may sustain from the negligent conduct of another in any way affected by these circumstances. He is none the less entitled to recover, unless it appears that his negligence or his fault has directly contributed to his damage. He may be a trespasser, and his trespass may have in no degree contributed to the damage he has sustained. Though a trespasser or a wrong-doer as to others, he may have been guilty of neither fault nor negligence as to the party from whom he has sustained damage. Though engaged in an act which is a violation of law in itself, he may have exercised all proper care for the safety of himself and his property, and to avoid any injury to another. A trespass is not the less a wrong that it is done by accident, or without design, or even against the will of the actor; but in such cases it is not a fault in the sense of that word, as used in connection with actions for negligence.

So a party may do an act which is a violation of law, and which may perhaps subject him to liability to those who may sustain damage by his conduct; yet it may not be an offense which would subject him to punishment, because the act may have been involuntary; done without negligence, and against his most earnest efforts. In such a case the act is a misfortune—it is not a fault.

It is not enough, then, to show that a party is a wrong-doer or a trespasser, or a violator of the law, to defeat his action for damage sustained from the negligence of another.

It must be shown that such act is a fault, which has directly contributed to the loss or damage of which the party complains. It is not a question, as it has been made in some cases, whether the party is a trespasser, or has done some wrongful act, but whether he is guilty of a fault or of negligence in reference to the matter in question, which has directly contributed to the injury.

The proper question, whether the fact that the plaintiff was on the left of the centre of the road was the fault of the plaintiff, or was a mere accident, was submitted to the jury.

* * *

Judgment on the verdict.

CHAPTER IV.

IMPUTED CONTRIBUTORY NEGLIGENCE.

Carrier's Negligence Imputed to Passenger.

THE BERNINA.

L. R., 12 P. D. 36 (Eng.). 1887.

[The court below held that none of the plaintiffs could recover.

* * * * * * * * *]

LINDLEY, L. J. * * * Three actions are brought in the Admiralty Division of the High Court by the respective legal personal representatives of three persons on board the Bushire, against the owners of the Bernina. Those persons were killed by a collision between the two vessels, both of which were negligently navigated. One of the three persons (Toeg) was a passenger on the Bushire; one (Armstrong) was an engineer of the ship, though not to blame for the collision. The third (Owen) was her second officer, and was in charge of her, and was himself to blame for the collision. The questions for decision are, whether any, and, if any, which of these actions can be maintained.

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Thorogood v. Bryan, 8 C. B. 115, was an action founded on Lord Campbell's Act. The facts were shortly as follows: The deceased was a passenger in an omnibus, and he had just got off out of it. He was knocked down and killed by another omnibus belonging to the defendants. There was negligence on the part of the drivers of both omnibuses, and it appears that there was also negligence on the part of the deceased himself. The jury found a verdict for the defendants, and there does not seem to have been any reason why the Court should have disallowed the verdict if not driven to do so on technical grounds. In those days, however, a misdirection by the judge to the jury compelled the Court to grant a new trial whether any injustice had been done or not; and, accordingly, the plaintiff moved for a new trial

on the ground of misdirection, and it is with reference to this point that the decision of the Court is of importance. The learned judge who tried the case told the jury in effect to find for the defendant if they thought that the deceased was killed either by reason of his own want of care or by reason of want of care on the part of the driver of the omnibus out of which he was getting. The last direction was complained of, but was upheld by the Court. The ratio decidendi was that if the death of the deceased was not occasioned by his own negligence it was occasioned by the joint negligence of both drivers, and that, if so, the negligence of the driver of the omnibus off which the deceased was getting was the negligence of the deceased; and the reason for so holding was that the deceased had voluntarily placed himself under the care of the driver. Maule, J., puts it thus: "The deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and the negligence of the driver was the negligence of the deceased." This theory of identification was quite new. No trace of it is to be found in any earlier decision, nor in any legal treatise, English or foreign, so far as I have been able to ascertain, nor has it ever been satisfactorily explained. It must be assumed, for the purpose of considering the grounds of the decision in question, that the passenger was not himself in fault. Assuming this to be so, then, if both drivers were negligent, and both caused the injury to the passenger, it is difficult to understand why both drivers or their masters should not be liable to him. The doctrine of identification laid down in Thorogood v. Bryan, 8 C. B. 115, is, to me, quite unintelligible. It is, in truth, a fictitious extension of the principles of agency, but to say that the driver of a public conveyance is the agent of the passengers is to say that which is not true in fact. Such a doctrine, if made the basis of further reasoning, leads to results which are wholly untenable, e. g., to the result that the passengers would be liable for the negligence of the person driving them, which is obviously absurd, but which, of course, the Court never meant. All the Court meant to say was that for the purposes of suing for negligence the passenger was in no better position than the man driving him. But why not? The driver of a public vehicle is not selected by the passenger otherwise than by being hailed by him as one of the public, to take him up; and such selection, if selection it can be called,

does not create the relation of principal and agent or master and servant between the passenger and the driver, the passenger knows nothing of the driver and has no control over him, nor is the driver in any proper sense employed by the passenger. The driver, if not his own master, is hired, paid, or employed by the owner of the vehicle he drives or by some other person who lets the vehicle to him. The orders he obeys are his employer's orders. These orders, in the case of an omnibus, are to drive from such a place to such a place and take up and put down passengers; and in the case of a cab the orders are to drive where the passenger for the time being may desire to go, within the limits expressly or impliedly set by the employer. If the passenger actively interferes with the driver by giving him orders as to what he is to do, I can understand the meaning of the expression, that the passenger identifies himself with the driver, but no such interference was suggested in Thorogood v. Bryan, 8 C. B. 115. * * *

I am of the opinion that the doctrine laid down in Thorogood v. Bryan is contrary to sound legal principles, and ought not to be regarded as law. Consequently I am of opinion that the decision in Toeg's and Armstrong's case ought to be reversed.

LEADING ILLUSTRATIVE CASES LAW OF TORTS

PART IV

DECEIT

CHAPTER I.

INTRODUCTION.

Warranty and Deceit.

MAHURIN v. HARDING.

28 N. H. 128. 1853.

Trespass on the Case.—The declaration alleged that the defendants being possessed of a mare, which was unsound and infected with the glanders, induced the plaintiff to take the mare in exchange for a mare of the plaintiff, falsely and fraudulently representing that the defendant's mare was sound, with the exception of "a slight touch of the heaves." Upon trial on the general issue, the Court instructed the jury that the plaintiff must prove that the affirmation was both false and fraudulent, that if the defendants made the statement in entire good faith, fully believing it to be true, they are not liable in this form of action; but if the affirmation was known or believed or suspected by them to be false, and the event proved that it was so, it should be deemed fraudulent. Verdict for the defendants, which the plaintiff moved to set aside because of the instructions.

BELL, J. The declaration in this case is in trespass on the case for deceit in a sale.

It is said in some of the books that assumpsit and case for deceit are in certain cases concurrent remedies for the same injuries in the sale of horses; and to some extent this is true.

Where a seller is chargeable upon an implied warranty of title, or where he makes an express warranty, or makes such statements as to the quality of the article he sells as he intends the purchaser shall rely upon, and which in law constitute a warranty; (Morrill v. Wallace, 9 N. H. Rep. 111; Whitney v. Sutton, 10 Wend. 413;) Cook v. Mosely, 13 Wend. 277; while at the same time he knows them to be false, and intends by them to deceive and impose upon the purchaser, the buyer may seek his redress either by action of assumpsit upon his warranty, or by action of deceit for the fraud. Stuart v. Wilkins, Doug. 21; Williamson v. Allison, 2 East, 446; Wallace v. Jarman, 2 Stark. 162; Wardell v. Davis, 13 Johns. 325; Cravens v. Grant, 4 Mon. 126; 2 Stephen's N. P. 1285.

The warranty is none the less a contract because it is the means by which a fraud is accomplished, and the fraud is in no way diminished, because the seller has at the same time bound himself by a warranty.

But these remedies, though concurrent, and though they entitle the suffered to the same measure of redress in damages, are by no means identical. The distinction between the two classes of actions, as being founded respectively on tort and on contract, is nowhere neglected or disregarded. There are substantial differences at common law, and, as remarked by the learned judge who tried this case, in his charge to the jury, the distinction is not merely formal, but in the present state of our law there is a substantial difference, which must not be overlooked. In tort, here, there is a remedy against the person, which ordinarily does not exist in actions on contracts.

The forms of declaring in these cases are substantially different. The declaration in assumpsit always states a consideration and a promise of warranty, and complains of a breach of the warranty. 1 Ch. Pl. 99; Saund. Pl. and Ev. 111; Carley v. Wilkins, 6 Barb. S. C. 557; Edick v. Crim, 10 Barb. S. C. 445. The contract to warrant, of the breach of which the plaintiff complains, and the entire consideration for it is indispensable to be stated. Miles v. Sheward, 8 East, 7; Webster v. Hodgkins, 5 Foster's Rep. 128.

In this action the allegations very often introduced, that the defendant intended to defraud, that he knew his warranty to be false, and that he thereby deceived and defrauded the plaintiff,

are immaterial, and need not be proved. The defendant is bound to answer for his false warranty, whether he knew it to be false or not; whether he intended a fraud, or acted with entire good faith, and fully believed it to be true. Denison v. Ralphson, 1 Vent. Rep. 366; Northcote v. Maynard, 3 Keb. 807; Anon. Lofft, 146; Gresham v. Postan, 2 C. & P. 540; Bayard v. Malcom, 1 Johns. 453; 2 Johns. 550; Case v. Boughton, 11 Wend. 107; Carly v. Wilkins, 6 Barb. S. C. 557.

The declaration for deceit alleges that the defendant induced the plaintiff to purchase an article by a warranty or by statements which he knew to be false, and thereby deceived and defrauded him. Evertson v. Miles, 6 Johns. 138; Case v. Boughton, 11 Wend. 107; Carley v. Wilkins, 6 Barb. S. C. 557; Edick v. Crim, 10 Barb. S. C. 445. And this is all that is essential to be alleged. Barney v. Dewey, 13 Johns. 224; Weeks v. Burton, 7 Vt. Rep. 67. It is not necessary to make any allegation in relation to the consideration or the terms of the contract of sale, unless they happen to be connected with the fraud alleged, in that case, though if a party incautiously recites the particulars of such a contract, he may be compelled to prove them as he states them, and may fail if any material variance occurs in his proof. Weall v. King, 12 East, 452; Jones v. Cowley, 4 B. & C. 446; Hands v. Burton, 9 East, 349; Morris v. Littlegoe, 2 Smith, 394; Blyth v. Bampton, 3 Bing. 472; Webster v. Hodgkins, ub. sup.; Hart v. Dixon, 1 Sel. N. P. 104; 2 N. H. Rep. 291; Barney v. Dewey, 13 Johns. 224; Corwin v. Davidson, 9 Cow. 22; Porter v. Talcott, 1 Cow. 359.

But the intention to defraud, the knowledge that his warranty or his statements were false, and the fact that the plaintiff was thereby defrauded, constitute, in cases of this kind, the very gist and foundation of the action for deceit, and they must be proved, or the action must fail. Springwell v. Allen, Aleyn, 91; Parkinson v. Lee, 2 East, 313; Dowding v. Mortimer, 2 East, 449n; 2 Stark. Ev. 266; 2 St. N. P. 1286; Dale's case, Cro. El. 44; Turner v. Brent, 12 Mod. 245; 1 Com. Dig. Action for Deceit, A. 8, A. 11, E. 4; Evertson v. Miller, 6 Johns. 138; Young v. Covell, 8 Johns. 23; Addington v. Allen, 11 Wend. 375.

A seller may in good faith make statements as to the qualities of the articles he sells, believing them to be true, and intending that the purchaser should rely upon them, either in the form of

explicit warranties, or of such representations as in law constitute warranties, and the purchase may be made in reliance upon their truth; but the seller is guilty of no fraud or deceit, for bad faith and a design to deceive are essential elements of every fraud, or deception; and though he may be liable upon his warranty, yet no action, founded on fraud or deceit, will lie in such case. Stone v. Denny, 4 Met. 151; Rubber Company v. Adams, 23 Pick. 256; Emerson v. Brigham, 10 Mass. Rep. 197; Kingsbury v. Taylor, 29 Maine Rep. 508; Hazard v. Irwin, 18 Pick. 95; Shrewsbury v. Blunt, 2 M. & G. 475; Freeman v. Baker, 5 B. & Ad. 797; Page v. Bent, 2 Met. 371. * * *

In former times, the more usual form of declaring in actions upon a false warranty, was in case for deceit, in which it was more commonly alleged that the defendant warrantizando vendidit an article as sound, well knowing that it was not so, though declarations in assumpsit were not uncommon. (2 Inst. Cler. 227; Butterfield v. Burroughs, 1 Salk. 211; nor declarations in case without warrantizando vendidit Firnis v. Leicester, Cro. Jac. 474; Roswell v. Vaughan, Cro. Jac. 196; Cross v. Garnett, 3 Mod. 261; Kendrick v. Burgess, Mo. 126.

In Williamson v. Allison, 2 East, 445, in 1802, in a declaration upon a warrantizando vendidit, it was expressly held, that the declaration was in case for deceit, but that by striking out the averment of the scienter, the action might still be maintained in tort, and therefore the scienter was not necessary to be proved.

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This decision seems to have been since followed in some cases in England. Gresham v. Postan, 2 C. & P. 540; and is cited in most of the elementary English books on the subject.

It has been followed in Vermont and some of the other States, and has been made the basis of a theory that in actions for deceit in the sale of personal property, if an express warranty is proved, it is not necessary to prove the scienter, or any allegation that the false warranty or affirmation was made with any design to deceive. But this idea is not supported by the decision in Williamson v. Allison, which is expressly limited to a declaration upon a warrantizando vendidit. See 3 V. Rep. 53; 10 Vt. Rep. 457; 17 Vt. Rep. 583.

The English case is without authority here, and seems to us entirely unsupported by any authority at common law. And it

seems to us entirely inconsistent with the doctrines of the common law to hold that an action for deceit can be sustained without evidence of intention to deceive. * * *

The declaration in the present case sets forth, that the defendants being possessed of a horse, which was unsound, and the plaintiff of another, of value, the defendants, to induce the plaintiff to exchange with them, did falsely and fraudulently affirm to him, that their horse was sound, and the plaintiff giving credit to their affirmation was induced to exchange, and did so, whereas the defendant's horse was not sound, etc., which they well knew, and so the defendants, by their false affirmation, have greatly injured and defrauded the plaintiff.

This is a common form of declaring in case for deceit. It has no feature of a declaration in assumpsit. It contains no promise, nor undertaking, nor consideration for any. It complains of no breach of any contract, or warranty. It does not even speak of any warranty. Its gist and substance is that the defendants, by their false and fraudulent affirmation, have defrauded the plaintiff, and not by any breach of contract. Assuredly no court could hold that such a declaration was proved by any evidence which did not establish the fact of fraud, of an intention to deceive, carried into effect by statements known to be false.

As, then, the allegation that the defendants well knew their horse to be unsound, was essential to be inserted in the declaration, either in direct terms, or in expressions of equivalent import, and necessary to be proved, the charge of the court below was entirely correct, and there must be,

Judgment on the verdict.

CHAPTER II.

THE DEFENDANT'S WRONGFUL CONDUCT.

Representation by Conduct.

REX v. BARNARD.

7 Car. & P. 784 (Eng.). 1837.

False Pretenses.—The indictment charged that the prisoner falsely pretended that he was an under graduate of the University of Oxford, and a commoner of Magdalen college, by means of which he obtained a pair of boot-straps from John Samuel Vincent.

It appeared that Mr. Vincent was a boot maker, carrying on business in High Street, Oxford; and that the prisoner came there, wearing a commoner's cap and gown, and ordered boots, which were not supplied him, and straps which were sent to him. He stated he belonged to Magdalen college.

It was proved by one of the butlers of Magdalen college that the prisoner did not belong to that college, and that there are no commoners at Magdalen college.

BOLLAND, B. (in summing up).—If nothing had passed in words, I should have laid down that the fact of the prisoner's appearing in the cap and gown would have been pregnant evidence from which a jury should infer that he pretended he was a member of the university, and if so, would have been a sufficient false pretense to satisfy the statute. It clearly is so by analogy to the cases in which offering in payment the notes of a bank which has failed, knowing them to be so, has been held to be a false pretense, without any words being used.

Verdict—Guilty.

REX v. DOUGLAS.

7 Car. & P. 644, note (Eng.). 1808.

In the case of Rex v. Douglass, which was tried on the 23rd day of February, 1808, before Lord Ellenborough, the defendant

was indicted for obtaining money from the Countess of Ilchester by false pretenses. The facts of the case were, that the defendant, in the assumed character of a porter from an inn, delivered a parcel, as from the country with a printed ticket, with writing charging carriage and porterage, and received the money charged. The parcel turned out to be a mock parcel, worth nothing. Part of the false pretenses charged in the indictment was taken from the porter's ticket.

Meaning of the Representation.

PEEK v. GURNEY.

Law Reports, 6 House of Lords, 377. 1873.

Appeal from a decree of the Master of the Rolls dismissing the appellant's bill. The appellant (Peek) having purchased from prior shareholders two thousand shares in the Overend & Gurney Company, was compelled upon the winding up of the company to contribute and pay nearly £100,000 on his shares. The bill alleged misrepresentation of facts and concealment of facts on the part of the directors in the prospectus they issued, by which the appellant had been induced to purchase shares and had been damnified, and he sought indemnity from the estates of the directors.

LORD CHELMSFORD.—I am not aware of any case in which an action at law has been maintained against a person for an alleged deceit, charging merely his concealment of a material fact which he was morally but not legally bound to disclose. The case of Keates v. Earl Cadogan[1] may be mentioned as an authority to the contrary. There it was held upon demurrer that an action for deceit would not lie against the owner of a house, who knew it to be in a ruinous and unsafe condition, for not disclosing the fact to a proposed tenant, who wanted the house for immediate occupation. In the course of the argument a case of Hill v. Gray[2] was cited, where the agent for the sale of a picture, knowing that the vendee labored under a delusion (as it is called) that the picture was the property of Sir Felix Agar, did not remove it, and Mr. Gray, under this misapprehension, purchased the picture. Lord Ellenbor-

[1] 10 C. B. 591.
[2] 1 Stark. 434.

ough, upon proof of these facts, said: "The case has arrived at its termination, since it appears that the purchaser labored under a deception, in which the agent permitted him to remain, on a point which he thought material to influence his judgment." It is to be observed that Hill v. Gray was not an action for deceit, but was brought by the owner of the picture against the purchaser upon the contract; and Chief Justice Jervis, in his judgment in Keates v. Earl Cadogan,[1] took some pains to show that there was something more in the case than mere concealment, and what amounted (as he called it) to aggressive deceit on the part of the agent of the seller. After quoting the following words of Lord Ellenborough: "The agent ought not to have let in a suspicion on the part of the purchaser which he knew enhanced the price; he saw that the defendant had fallen into a delusion in supposing the picture to be Sir Felix Agar's, and yet he did not remove it," he added, "That shows something like an act done." It may be questionable whether this effect could properly be given to the silence of the agent; but the attempted explanation shows the anxiety of Chief Justice Jervis to reconcile Hill v. Gray with the judgment of the Court in the case before it—that the mere non-disclosure, by the owner of the house, of its ruinous state was no ground for an action for deceit.

Assuming that mere concealment will not be sufficient to give a right of action to a person who, if the real facts had been known to him, would never have entered into a contract, but that there must be something actively done to deceive him and draw him in to deal with the person withholding the truth from him, it appears to me that this additional element exists in the present case. The concealment of the insolvent state of the old firm of Overend & Gurney was absolutely essential towards the formation of the limited company, and the respondents not merely were silent as to this important fact, but actively represented that the firm was in such a flourishing condition that the goodwill of the business was worth half a million. It is said that the prospectus is true as far as it goes, but half a truth will sometimes amount to a real falsehood; and I go farther and say, that to my mind it contains a positive misrepresentation. The language of the prospectus must be read in the sense in which

[1] 10 C. B. 591, 600.

the respondents must have known it would be understood. In that sense it is not true (as already observed) that the sum of £500,000, the consideration for the business, was paid to the old firm in cash and in shares; for the whole of it was to be applied in liquidation of the enormous debt of that firm, the existence of which was designedly kept from the public, to whom the prospectus was addressed. I cannot doubt that there was, beyond the passive concealment of the state of the affairs of the old firm, an active misrepresentation of the truth by the respondents, for which they were answerable either at law or equity. * * *

The last question to be considered is, whether the appellant, who alleges that he purchased his shares upon the faith of the prospectus, has a remedy against the respondents for the misrepresentations which it contains. The appellant contends that the prospectus being addressed to the public for the purpose of inducing them to join the proposed company, any one of the public who is led by it to take shares, whether originally as an allottee, or by purchase of allotted shares upon the market, is entitled to relief against the persons who issued the prospectus. The respondents on the other hand insist that the prospectus, not being an invitation to the public ultimately to become holders of shares, but to join the company at once by obtaining allotments of shares, those only who were drawn in by the misrepresentations in the prospectus to become allottees, can have a remedy against the respondents.

There can be no doubt that the prospectus was issued with the object alleged by the respondents. * * *

But the learned counsel for the appellant, not denying the original purpose of the prospectus, contended, upon the authority of decided cases, that the prospectus, having reached the hands of the appellant, and he, relying upon the truth of the statement it contained, having been induced to purchase shares, the respondents were liable as for a misrepresentation made to him personally. I must, therefore, examine shortly the authorities relied upon. * * *

It appears to me that there must be something to connect the directors making the representation with the party complaining that he has been deceived and injured by it; as in Scott v. Dixon, by selling a report containing the misrepresentations complained of to a person who afterwards purchases shares upon the faith

of it, or as suggested in Gerhard v. Bates, by delivering the fraudulent prospectus to a person who thereupon becomes a purchaser of shares, or by making an allotment of shares to a person who has been induced by the prospectus to apply for such allotment. In all these cases the parties in one way or other are brought into direct communication; and in an action the misrepresentation would be properly alleged to have been made by the defendant to the plaintiff; but the purchaser of shares in the market upon the faith of a prospectus which he has not received from those who are answerable for it, cannot by action upon it so connect himself with them as to render them liable to him for the misrepresentations contained in it, as if it had been addressed personally to himself. I therefore think that the appellant cannot make the respondents responsible to him for the loss he has sustained by trusting to the prospectus issued by them inviting the public to apply for allotments of shares; and upon this ground only (being different from that on which the Master of the Rolls proceeded) I submit to your Lordships that the decree appealed from should be affirmed.

LORD CAIRNS. * * * This brings me, therefore, to the consideration of the prospectus; and before looking at the terms of it, I may say that I entirely agree with what has been stated by my noble and learned friends before me, that mere silence could not, in my opinion, be a sufficient foundation for this proceeding. Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would in my opinion form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false. * * *

The object of the prospectus on the face of it is clearly to invite the public to take shares in the new company. The prospectus is, as is usual in such cases, an invitation, and there is appended to it a form of application for shares, which was to be filled up, and upon which form the invitation was to be answered. It is a prospectus in this shape, addressed to the

whole of the public, no doubt, and any one of the public might take up the prospectus and appropriate it in that way to himself by answering it upon the form upon which it is intended by the prospectus that it should be answered. The appellant, however, did not take up and did not appropriate the prospectus in this way. For reasons which it is unnecessary to inquire into, he declined to take, or at all events he did not originally take any shares in the company. The allotment of shares began on the 24th day of July; it appears to have been completed on the 28th of July; and it is stated that two or three times the number of shares to be had in the company were applied for. The allotment having been completed, the prospectus, as it seems to me, had done its work; it was exhausted. * * *

Appeal dismissed.

Nature of the Representation.

EDGINGTON v. FITZMAURICE.

Law Reports, 29 Ch. Div. 459. 1885.

Action against directors and officers of a company asking for the repayment of a sum of £1500 advanced by the plaintiff on debentures of the company, on the ground that he was induced to advance the money by the fraudulent misrepresentations of the defendants. The plaintiff testified that he relied upon a prospectus issued by the defendants which contained a false statement regarding the objects for which the debentures were issued. Judgment for the plaintiff at the hearing before Denman, J. The defendants appealed.

BOWEN, L. J. This is an action for deceit, in which the plaintiff complains that he was induced to take certain debentures by the misrepresentations of the defendants, and that he sustained damage thereby. The loss which the plaintiff sustained is not disputed. In order to sustain his action he must first prove that there was a statement as to facts which was false; and secondly, that it was false to the knowledge of the defendants, or that they made it not caring whether it was true or false. For it is immaterial whether they made the statement knowing it to be untrue, or recklessly, without caring whether it was true or not, because to make a statement recklessly for the

purpose of influencing another person is dishonest. It is also clear that it is wholly immaterial with what object the lie is told. That is laid down in Lord Blackburn's judgment in Smith v. Chadwick, 9 App. Cas. 201, but it is material that the defendant should intend that it should be relied on by the person to whom he makes it. But, lastly, when you have proved that the statement was false, you must further show that the plaintiff has acted upon it and has sustained damage by so doing: you must show that the statement was either the sole cause of the plaintiff's act, or materially contributed to his so acting. So the law is laid down in Clarke v. Dickson, 6 C. B. (N. S.) 453, and that is the law which we have now to apply. * * *

But when we come to the third alleged misstatement I feel that the plaintiff's case is made out. I mean the statement of the objects for which the money was to be raised. These were stated to be to complete the alterations and additions to the buildings, to purchase horses and vans, and to develop the supply of fish. A mere suggestion of possible purposes to which a portion of the money might be applied would not have formed a basis for an action of deceit. There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact. Having applied as careful consideration to the evidence as I could, I have reluctantly come to the conclusion that the true objects of the defendants in raising the money were not those stated in the circular. I will not go through the evidence, but looking only to the cross-examination of the defendants, I am satisfied that the objects for which the loan was wanted were misstated by the defendants, I will not say knowingly, but so recklessly as to be fraudulent in the eye of the law. * * * Appeal dismissed.

SWIFT v. ROUNDS.

19 R. I. 527. 1896.

Trespass on the case for deceit. The first count alleged that the defendant bought of the plaintiffs goods of the value of $400

not intending to pay for them, but intending to deceive and cheat the plaintiffs of the value of the goods. The second count alleged that the defendant represented that he intended to pay for the goods, but that in fact he did not intend to pay for them. Demurrer to declaration.

TILLINGHAST, J. * * * We are inclined to the opinion, after some hesitation, that the declaration states a case of deceit. Any fraudulent misrepresentation or device, whereby one person deceives another, who has no means of detecting the fraud, to his injury and damage, is a sufficient ground for an action of deceit. Deceit is a species of fraud, and consists of any false representation or contrivance whereby one person overreaches and misleads another, to his hurt. And, while the fraudulent misrepresentation relied upon usually consists of statements made as to material facts, either verbally or in writing, yet, it may be made by conduct as well. Grinnell on Law of Deceit, p. 35. A man may not only deceive another to his hurt by deliberately asserting a falsehood, as, for instance, by stating that A. is an honest man when he knows him to be a rogue, or that a horse is sound and kind when he knows him to be unsound and vicious, but also by any act or demeanor which would naturally impress the mind of a careful man with a mistaken belief, and form the basis of some change of position by him. 1 Story, Eq. Jur. Sec. 192. In Ex parte Whittaker, 10 Ch. App. 449, Mellish, L. J., says: "It is true, indeed, that a party must not make any mispresentation, express or implied; and, as at present advised, I think Shackelton, when he went for the goods, must be taken to have made an implied misrepresentation that he intended to pay for them, and if it were clearly made out that at that time he did not intend to pay for them, I should consider that a case of fraudulent misrepresentation was shown." See, also, Lobdell v. Baker, 1 Metc. (Mass.) 201; 1 Benj. Sales (Ed. 1888), Sec. 524. In the case at bar, the declaration alleges that the defendant bought the goods in question upon credit, fraudulently intending not to pay for them, but to cheat the plaintiffs out of the value thereof. By the act of buying the goods of the plaintiffs, the defendant impliedly promised to pay for the same, which promise was equally as strong and binding as though it had been made in words or even in writing. The plaintiffs had

the right to rely on this promise, and to presume that it was made in good faith. It turns out, however, according to the allegations aforesaid, that it was not made in good faith, but, on the contrary, was made for the purpose of deceiving the plaintiffs into the act of parting with their goods, the defendant intending by the transaction to cheat them out of the value thereof. The fraud, then, consisted in the making of the promise, in the manner aforesaid, with the intent not to perform it. By the act of purchasing the goods on credit the defendant impliedly represented that he intended to pay for them. The plaintiff relied on this representation, which was material and fraudulent, and was damaged thereby. All the necessary elements of fraud or deceit, therefore, were present in the transaction. See Upton v. Vail, 6 Johns. 181; Bartholomew v. Bentley, 15 Ohio, 666; Bish. Noncont. Law, Sections 314-318; Burrill v. Stevens, 73 Me. 400; Barney v. Dewey, 13 Johns. 226; Hubbell v. Meigs, 50 N. Y. 491. The general doctrine which controls this action is fully reviewed by Mr. Wallace in a note to Pasley v. Freeman, 2 Smith, Lead. Cas. 101. As said by Bigelow (Frauds, p. 484): "To profess an intent to do or not to do, when a party intends the contrary, is as clear a case of misrepresentation and of fraud as could be made." See, also, page 466, as to what constitutes a representation. In Goodwin v. Horne, 60 N. H. 486, the court say: "Ordinarily false promises are not fraudulent, nor evidence of fraud, and only false representations of past or existing facts are actionable, or can be made the ground of defense. * * * But when a promise is made with no intention of performance, and for the very purpose of accomplishing a fraud, it is a most apt and effectual means to that end, and the victim has a remedy by action or defense. Such are cases of concealed insolvency and purchases of goods with no intention to pay for them." In Byrd v. Hall, 1 Abb. Dec. 286, it was held that, although a purchase of goods on credit by one who knows himself to be insolvent is not fraudulent, yet, where it is made with preconceived design not to pay, it is fraudulent.

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We have hesitated somewhat in arriving at the conclusion that an action of deceit will lie upon the facts set out in the declaration for the reason that, among the numerous cases of fraud and deceit to be found in the books, we have not been referred to any

nor have we been able to find any, where the action of deceit was based simply on the act of buying goods on credit, intending not to pay for them. In Lyons v. Briggs, 14 R. I. 224, which was an action of deceit, Durfee, C. J., intimates, however, that deceit would lie, in a case like the one before us, by the use of the following language: "It is not alleged that the buyer did not intend to pay when he bought, but only that he falsely and fraudulently asserted that he could be safely trusted." But the authorities are overwhelming to the effect that it is a fraud to purchase goods intending not to pay for them, and that the vendor, upon discovering the fraud, may repudiate the sale and reclaim the property, or may sue in trover or in some other action of tort for the damages sustained by the fraud. And, this being so, we fail to see why an action of deceit, which is an action of tort based on fraud, may not lie as well; for to obtain goods on credit, intending not to pay for them, is as much a trick or device as it would be to falsely represent in words any material fact whereby the vendor should be induced to part therewith. But defendant's counsel contends that the alleged representation was not as to any fact, present or past, but merely as to what the defendant would do in the future with reference to paying for the goods, and that to say what one intends to do is identical to saying what one will do in the future, which amounts simply to a promise; and, furthermore, that a representation of what will happen in the future, even if not realized, is not such a representation as will support this action. We do not assent to this method of reasoning. The state of a man's mind at a given time is as much a fact as is the state of his digestion. Intention is a fact. Clift v. White, 12 N. Y. 538. Hence a witness may be asked with what intent he did a given act. Seymour v. Wilson, 14 N. Y. 667. A man who buys and obtains possession of goods on credit, intending not to pay for them, is then and there guilty of fraud. The wrong is fully completed, and no longer exists in intention merely, and a cause of action instantly accrues thereon in favor of the vendor to recover for the wrong and injury sustained. * * * In Stewart v. Emerson, 52 N. H. 301, where it was alleged, in reply to the defendant's plea of discharge in bankruptcy, that the debt in question was created by the fraud of the defendant, Doe, J., in the course of a long and vigorous opinion, used the following language, which is so

apt and pertinent that we quote it. He said: "When the intent not to pay is concealed, the intent to defraud is acted out. The mere omission of A. to disclose his insolvency might not be satisfactory proof of a fraudulent intent in all cases. He might expect to become solvent. He might intend to pay all his creditors. He might intend to pay B. though unable to pay others. His fixed purpose never to pay B. is a very different thing from his present inability to pay all or any of his creditors. A man may buy goods with time for trying to pay for them, on the strength of his known or inferred disposition to pay his debts, his habits, character, business capacity, and financial prospects, without his present solvency being thought of, and even when his present insolvency is known to the vendor. But who could obtain goods on credit with an unconcealed determination that they should never be paid for? The concealment of such a determination is conduct which reasonably involves a false representation of an existing fact, is not less material than a misrepresentation of ability to pay (Bradley v. Obear, 10 N. H. 477), and is an actual artifice, intended and fitted to deceive. * * * An application for or acceptance of credit by a purchaser is a representation of the existence of an intent to pay at a future time, and a representation of the nonexistence of an intent not to pay. What principle of law requires a false and fraudulent representation to be express, or forbids it to be fairly inferred from the act of purchase? A representation of a material fact, implied from the act of purchase, and inducing the owner of goods to sell them, is as effective for the vendee's purpose as if it had been previously and expressly made. If it is false, and known to the pretended purchaser to be false, and is intended and used by him as a means of converting another's goods to his own use without compensation, under the false pretense of a purchase, why does it not render such a purchase fraudulent? When the intent is to pay, it is necessarily understood by both parties, and need not be expressly represented as existing. When the intent is not to pay, it is of course concealed. Whether the deceit is called a false and fraudulent representation of the existence of an intent to pay, or a fraudulent concealment of the existence of an intent not to pay, the fraud described is, in fact, one and the same fraud."

Demurrer overruled and case remitted.

Opinions. Simplex Commendatio

GORDON v. BUTLER.

105 U. S. 553. 1882.

Action for damages arising from deceit. The defendant (Gordon) being desirous of obtaining certain quarries, obtained a loan of $10,000.00 from the plaintiff, secured by mortgages upon the land in which the quarries were situated. To induce the plaintiff to make the loan, the defendant Gordon obtained from Watkins & Foster a certificate stating that in their best judgment the land was worth $26,000. An adjoining quarry, similar in external appearance, had furnished large quantities of valuable stone, but the quarries in question had not been opened sufficiently to show their extent and value, and in fact they were worth much less than the sum loaned upon them.

Verdict for the plaintiff.

FIELD, J. The question then is, whether, upon the proof furnished by the plaintiff, a cause of action was established against the defendants; for, if not, the motion to direct the jury to find in their favor should have been granted. Upon this question we have no doubt. The essence of the charge against them is a conspiracy to defraud the plaintiff, carried into execution by a false and fraudulent certificate of valuation of the property given as security for the loan. The certificate of Watkins and Foster is that, in the best judgment of each, the lots were worth the sums severally stated. To justify any imputation of fraud in giving the certificate, it was necessary to show that the parties signing it had knowledge, at the time, that the value of the property was materially less than their estimate. And from the nature of the property and its imperfectly developed condition, such knowledge was impossible. No one could know its actual value until further development was made. Until then, any estimate must have been entirely speculative and conjectural. It would depend as much, perhaps, upon the temperament and expectation of the party making it, as upon any knowledge of facts. The law does not hold one responsible for the extravagant notions he may entertain of the value of the property, dependent upon its future successful exploitation, or the result of future enterprises; nor for expressing them to one acquainted with its

general character and condition. How could an overestimate in such case be shown? Other estimates would be equally conjectural. The law does not fasten responsibility upon one for expressions of opinion as to matters in their nature contingent and uncertain. Such opinions will probably be as variant as the individuals who give them utterance. A statement of an opinion assigning a certain value to property like a mine or a quarry not yet opened is not to be pronounced fraudulent because the property upon subsequent development may prove to be worthless; nor is it to be pronounced honest because the property may turn out of much higher value.

The case of Holbrook v. Connor, which arose in the Supreme Court of Maine, illustrates this doctrine. There the vendor and his agent represented, among other things, that lands sold by them contained large deposits of oil, and were of great value for the purpose of digging, boring for, and manufacturing it; and upon the representations the purchasers acted. * * *

Whenever property of any kind depends for its value upon contingencies which may never occur, or developments which may never be made, opinion as to its value must, necessarily, be more or less of a speculative character; and no action will lie for its expression, however fallacious it may prove, or whatever the injury a reliance upon it may produce. The determination of its truth or falsity, until the contingency occurs or becomes impossible, would lead the court into investigations for which they have no fixed rules to guide their own judgments or to instruct juries.

For opinions upon matters capable of accurate estimation by application of mathematical rules or scientific principles, such, for example, as the capacity of boilers, or the strength of materials, the case may be different. So, also, for opinions of parties possessing special learning or knowledge upon the subjects in respect to which their opinions are given, as of a mechanic upon the working of a machine he has seen in use, or of a lawyer upon the title of property which he has examined. Opinions upon such matters are capable of approximating to the truth, and for a false statement of them, where deception is designed and injury has followed from reliance on them, an action may lie. But to this class the present case does not belong. It falls within the class first mentioned.

SMITH v. LAND AND HOUSE PROPERTY CORPORATION.

L. R. 28 Ch. Div. 7. 1884.

Action for specific performance of a contract whereby the defendants agreed to purchase a hotel from the plaintiffs. The defendants resisted enforcement of the contract and asserted a counter-claim on the ground of fraud. The fraud consisted in representations by the plaintiffs that the property was held by Frederick Fleck, "a very desirable tenant," whereas in fact Fleck had been very dilatory in the payment of rent.

Mr. Justice Denman dismissed the plaintiffs' action and rescinded the contract. The plaintiffs appealed.

BOWEN, L. J. * * * In considering whether there was a misrepresentation, I will first deal with the argument that the particulars only contain a statement of opinion about the tenant. It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion. Now a landlord knows the relations between himself and his tenant, other persons either do not know them at all or do not know them equally well, and if the landlord says that he considers that the relations between himself and his tenant are satisfactory, he really avers that the facts peculiarly within his knowledge are such as to render that opinion reasonable. Now are the statements here statements which involve such a representation of material facts? They are statements on a subject as to which *prima facie* the vendors know everything and the purchasers nothing. The vendors state that the property is let to a most desirable tenant, what does that mean? I agree that it is not a guarantee that the tenant will go on

paying his rent, but it is to my mind a guarantee of a different sort, and amounts at least to an assertion that nothing has occurred in the relations between the landlords and the tenant which can be considered to make the tenant an unsatisfactory one. That is an assertion of a specific fact. Was it a true assertion? Having regard to what took place between Lady Day and Midsummer, I think that is was not. On the 25th of March, a quarter's rent became due. On the 1st of May, it was wholly unpaid and a distress was threatened. The tenant wrote to ask for time. The plaintiffs replied that the rent could not be allowed to remain over Whitsuntide. The tenant paid on the 6th of May £30, on the 13th of June £40, and the remaining £30 shortly before the auction. Now could it at the time of the auction be said that nothing had occurred to make Fleck an undesirable tenant? In my opinion a tenant who had paid his last quarter's rent by driblets under pressure must be regarded as an undesirable tenant. * * *

COWLEY v. SMYTH.

46 N. J. L. 380. 1884.

This suit was brought by a depositor in the Mechanics' and Laborers' Savings Bank in Jersey City, against the defendant, a director of the bank, to recover damages for false representations made by the defendant as to the solvency and condition of the bank, whereby the plaintiff was induced to leave in the bank money he had on deposit, which was lost by reason of the subsequent failure of the bank. * * *

The defendant, who was a director of the bank and a member of the finance committee, said to the plaintiff, in reply to a question regarding a rumor that the bank was in unsound condition: "It can't be so unknown to me and Mr. Monks. We are on the finance committee. There can be nothing wrong with the bank unknown to me and Mr. Monks. Don't believe any of these false reports; believe me; take my word for it. The bank is good, paying six per cent.—the best in the state. If all that is in Jersey tells you the bank is bad, don't believe it till I tell you." He also said "there was a surplus of over $6000 after the dividends were paid."

The bank was insolvent at the time the representation was made, but the defendant had no actual knowledge of that fact.

DEPUE, J. This action is an action on the case for deceit. There is a distinction between relief, either affirmative or defensive, in courts of equity on the ground of fraud, and the remedy for fraud in a court of law. Courts of equity grant affirmative relief by way of reformation or cancellation of instruments, and even defensive relief in proceedings to enforce an obligation or liability, on the ground of constructive fraud, such as would afford no relief in law, especially by action for deceit. 2 Pom. Eq. 872; Arkright v. Newbold, L. R. 17 Ch. Div. 302, 317, 330; Redgrave v. Hurd, 20 Id. 1, 12. Reese River Silver Mining Co. v. Smith, L. R. 4 H. of L. Cas. 64, in which Lord Cairns held that "if persons make assertions of facts of which they are ignorant, whether such assertions are true or untrue, they become, in a civil point of view, as responsible as if they had asserted that which they knew to be untrue," is an instance of equitable relief by way of rescission. * * *

The action of deceit, to recover damages for a false and fraudulent representation, differs in principle from the cases that have been referred to. In such an action a false representation, without a fraudulent design, is insufficient. There must be moral fraud in the misrepresentation to support the action. Pasley v. Freeman, 3 T. R. 51, and Haycraft v. Creasy, 2 East 92, are the leading cases on this subject. Both of these cases were decided by a divided court. In Pasley v. Freeman the question arose on a motion in arrest of judgment. The count in the declaration which gave rise to the motion averred that the defendant, "intending to deceive and defraud the plaintiffs, did wrongfully and deceitfully encourage the plaintiffs to sell and deliver to one J. C. F. divers goods * * * upon trust, and did for that purpose * * * falsely, deceitfully and fraudulently assert and affirm to the plaintiffs that the said J. C. F. * * * was a person safely to be trusted and given credit to, and did thereby falsely, fraudulently and deceitfully cause and procure the plaintiffs to sell and deliver the said goods * * * upon trust and credit to the said J. C. F." The count also contained an averment that J. C. F. was not a person safely to be trusted and given credit to, and that the defendant well

knew the same. The court held that a false affirmation, made with the intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit, and that as a matter of pleading, fraudulenter without sciens, or sciens without fraudulenter, would be sufficient, but that the fraud be proved. Haycraft v. Creasy was before the court on a rule for a new trial, after a verdict for the plaintiff. In that case the defendant, to an inquiry by the plaintiff concerning the credit of another, made the representation that the party might safely be credited, and that he spoke this from his own knowledge and not from hearsay. The court (Gross, Lawrence and Le Blanc, J. J., Lord Kenyon dissenting,) held that the action could not be maintained, it appearing that the representation was made by the defendant bona fide and with a belief of the truth of it. * * *

The Court of Queen's Bench departed from the doctrine of Haycraft v. Creasy in two cases, and held that an action at law might be maintained for false representations, though there was neither fraud nor negligence. Fuller v. Wilson, 3 Q. B. 57; Evans v. Collins, 5 Id. 804. But Wilson v. Fuller was reversed on error, (3 Q. B. 68, 1009,) and the question was finally set at rest in the English courts in Taylor v. Ashton 11 M. & W. 401, and Ormrod v. Huth, 14 Id. 651. * * * In Ormrod v. Huth the action was in case for false representations. The suit arose upon a sale of cotton by sample—the cotton delivered not being equal in quality with the sample. The plaintiff's counsel contended that the delivery of samples not corresponding with the bulk was a false representation of the quality of the cotton, which must be considered, in point of law, as fraudulent, as being the statement of a fact which the party making it did not know to be true. The judge directed the jury that unless they could see grounds for inferring that the defendants or their brokers were acquainted with the fraud that had been practiced in the packing, or had acted in the transaction against good faith or with a fraudulent purpose, the defendants were entitled to a verdict. On error the Court of Exchequer Chamber sustained the charge of the judge. Tindal, C. J., delivering the opinion of the court, said that "the rule to be deduced from all the cases appears to us to be that where, upon the sale of goods, the purchaser is satisfied without requiring a warranty, he cannot re-

cover upon a mere representation of the quality, * * * unless he can show that the representation was bottomed in fraud. If, indeed the representation was false to the knowledge of the party making it, this would, in general, be conclusive evidence of fraud; but if the representation was honestly made, and believed at the time to be true by the party making it, though not true in point of fact, we think it does not amount to fraud in law." The English courts have considered these decisions as a finality, and it is now there settled that there can be no fraud without dishonest intention—no such fraud as was formerly termed legal fraud. L. Benj. on Sales (Corbins ed.), par. 638.

The American cases, as might be expected of a subject so prolific of decisions, are not altogether harmonious. Mr. Pomeroy, speaking of the cases I have cited from the Queen's Bench as holding that a representation, false in fact, if acted upon, would support an action, and that the defendant's liability was independent of his knowledge or ignorance of its actual falsity, says, "This theory admitted the possibility of fraud at law where there was no moral delinquency. It denied that moral wrong was an essential element in the legal conception of fraud. The same view was for a time accepted and adopted by a considerable number of decisions in different American states. These cases have, however, been overruled, and the theory itself abandoned in England, and generally, if not universally, throughout the states of our own country. It is now a settled doctrine of the law that there can be no fraud, misrepresentation or concealment without some moral delinquency. There is no actual legal fraud which is not also a moral fraud." 2 Pom. Eq., par. 884. The English and American cases are fully cited in the notes to Pasley v. Freeman, 2 Sm. Lead. Cas. 176-186. They have placed the law on this subject where it was put by Pasley v. Freeman and Haycraft v. Creasy, and have, I think, upon principle as well as by the great weight of authority, established the law on the rational basis that in the action of deceit, moral fraud is essential to furnish a ground of action.

The principle on which the action for deceit is founded being ascertained, the next consideration is with respect to the proof and the proper instructions upon the evidence; for, whatever the character of the evidence may be—whether it consists of

knowledge of the falsity of the representation for some other fraudulent device intended for the purpose of deception—the evidence must be submitted to the jury under proper instructions. And I think much of the apparent conflict in the cases has arisen from the failure to discriminate between the issue to be proved and the force and effect of the evidence presented.

The simplest form in which the question of the sufficiency of proof arises is where the proof is that the representation was false to the defendant's knowledge. The scienter as well as the falsehood being proved, proof of the fraudulent intent is regarded as conclusive. Evidence that the defendant intended no fraud will not be received, and a jury will be instructed to find for the plaintiff, though they should be of opinion that the defendant was not instigated by a corrupt motive of gain for himself, or by a malicious motive of injury to the plaintiff. Foster v. Charles, 6 Bing. 396; S. C., 7 Id. 105; Polhill v. Walter, 3 B. & Ad. 114; and Jylne v. Marwood, 15 C. B. 778, are cases of this kind. In each of these cases the proof was that the representation was false to the knowledge of the defendant. The jury added to its finding an expression of opinion that there was no fraudulent intent, but the court nevertheless entered judgment for the plaintiff on the ground that a wilful falsehood was a fraud. The language of Lord Campbell in Wilde v. Gibson, 1 H. of L. Cas. 605, 633, was directed to cases of this aspect; and Jessel, M. R., in a case where it was proved that the representation was untrue to the defendant's knowledge, refused to receive evidence that he in fact believed it to be true. Hine v. Campion, L. R., 7 Ch. Div. 344.

In other cases of actionable frauds, the probative force and effect of the evidence to establish the fraudulent will depend upon the circumstances of the particular case. This question is presented in a complex form where the defendant has added to a representation—which turns out to be untrue, but was not false to his knowledge—an affirmation that he made the representation as of his own knowledge. In such cases the force and effect of the evidence will depend, in a great measure, upon the nature of the subject concerning which the representation was made. If it be with respect to a specific fact or facts susceptible of exact knowledge, and the subject matter be such as that the affirmation of knowledge is to be taken in its strict sense, and not

merely as a strong expression of belief, the falsehood in such a representation lies in the defendant's affirmation that he had the requisite knowledge to vouch for the truth of his assertions, and that being untrue, the falsehood would be wilful and therefore fraudulent. But where the representation is concerning a condition of affairs not susceptible of exact knowledge, such as representations with respect to the credit and solvency of a third person, or the condition or credit of a financial institution, the assertion of knowledge, as was held in Haycraft v. Creasy, "is to be taken secundum subjectam materiam, as meaning no other than a strong belief founded upon what appeared to the defendant to be reasonable and certain grounds." In such a case the question is wholly one of good faith. The form of the affirmation will cast the burden of proof on the defendant, but when the evidence is in, the issue is whether the defendant honestly believed the representation to be true. In support of such an issue the defendant may, by way of exculpation, resort to evidence not admissible in actions for other kinds of deceit. He may, as in Haycraft v. Creasy, give evidence that the person whose ability he affirmed lived in a style, and with such appearances of property and means, as gave assurance of affluence. He may give in evidence the information he had upon the subject, (Shrewsbury v. Blount, 2 M. & G. 475,) and show the general reputation for trustworthiness of the person whose credit he affirmed. Sheen v. Bumpsted, 2 H. & C. 193. In fine, he may avail himself of any evidence which may tend to show good faith or probable grounds for his belief, leaving the question to be determined, upon all the evidence, whether his conduct was bona fide—whether, at the time he made the representation, he honestly believed that his representation was true.

The Massachusetts cases cited to support the instruction certified to the court admit the distinction I have referred to. In Tryon v. Whitmarsh 1 Metc. 1, which was an action for false and fraudulent representations as to the credit of third persons, whereby the plaintiffs were induced to give them credit, a verdict for the plaintiffs was set aside for the reason that the judge should have instructed the jury that the defendant would not be liable if they were of opinion, from the evidence, that he gave an honest opinion, and believed that the persons recommended were trustworthy. In Hazard v. Irwin, 18 Pick. 96, the false

representation was by a vendor on the sale of an engine, with respect to its condition. He made the representation as of his own knowledge. The condition of the engine was a fact the vendor could easily have ascertained. The court, (Shaw, C. J.) cited Haycraft v. Creasy, and distinguished it from the case in hand in that the subject matter of the representation was "one of fact in respect to which a person can have precise and accurate knowledge, and in respect to which, if he speaks of his own knowledge, and has no such knowledge, his affirmation is essentially false." In Page v. Bent, 2 Metc. 371, the false representation was in relation to the nature and amount of the assets assigned by the defendants. The condition and amount of the assets were peculiarly within the knowledge of the defendants. The court, (Shaw, C. J.,) said, "The principle is well settled that if a person make a representation of a fact as of his own knowledge, in relation to a subject matter susceptible of knowledge, and such representation is untrue * * * it is a fraud and deceit for which the party making it is responsible. But in a matter of opinion, judgment or estimate, if he states a thing of his own knowledge, if he in fact believes it, and it is not intended to deceive, it is not a fraud although the matter misstated is not true. The reason is that it is apparent from the subject matter that what is thus stated as knowledge must be considered and understood by the party to whom it is addressed as an expression of strong belief only, because it is a subject of which knowledge, in its strict sense, cannot be had. In Stone v. Denny, 4 Metc. 151, the action was on a false representation on a sale of property made by the defendant, on a schedule exhibited which he represented as correct of his own knowledge. Dewey, J., in his opinion referred to the Massachusetts cases and says, "From an examination of those cases and others bearing upon the question, I apprehend, however, that it will be found that no real change has been sanctioned in the great and leading principles of law applicable to cases of deceit, and that now, as formerly, to charge a party in damages for a false representation * * * it must appear that it was made with a fraudulent intent, or was a wilful falsehood." The illustration he gives is "of one asserting as of his own knowledge a matter of which he has no knowledge, nor any sufficient ground for making the assertion." The subsequent observation of the learned judge,

"that if one positively affirms a fact as of his own knowledge, and his affirmation is false, his representation is deemed fraudulent," is unobjectionable as applied to the facts of that case, where, because of the subject matter of the representation, the affirmation of knowledge was to be taken in its strict sense, and not as only a strong expression of belief.

The principle adjudged in Haycraft v. Creasy is applicable to actions against directors for false and fraudulent representations concerning the financial condition of institutions in their charge. It was so applied in Taylor v. Ashton, which has become a leading case in the English law. The affairs of such an institution must necessarily be entrusted to executive officers and subordinate agents, and the directors generally cannot know, and have not the requisite ability to learn, by their own efforts, the exact condition of the affairs of the company, and it has been found that no vigilance on their part has been adequate to protect these institutions from frauds and peculations covered up and concealed by false entries and false reports. A representation by a director that the institution is in a sound and solvent condition within his own knowledge possesses the legal characteristics of the like representations as to the credit and financial ability of a third person, such as was before the court in Haycraft v. Creasy, and must be subject to the same legal rule.

* * * * * * * * *

On these facts the defendant was not entitled to the non-suit he asked for; but he was entitled to a different instruction to the jury. The case cannot be distinguished from Haycraft v. Creasy and Taylor v. Ashton, and it should have been left to the jury to say whether, upon the evidence, the defendant made the representations with a fraudulent purpose to deceive, or whether he made them in good faith, and in the honest belief that they were true.

There will be a certificate accordingly.

HAYCRAFT v. CREASY.

2 East 92. 1801.

Action on the case for false and fraudulent representations as to the credit of one E. F. Robertson, whereby the plaintiff was induced to sell her goods to the amount of £485. The defendant

believed the representations to be true, was himself duped by her apparent wealth, and had made acceptance for her to the sum of £2000.

Verdict for the plaintiff. A rule was obtained, calling on the plaintiff to show cause why the verdict should not be set aside, and a new trial had.

LORD KENYON, C. J. If there be any doubt in this case, I should wish to have it put in such shape as to be carried to the dernier resort. But not knowing how that can be done, I shall deliver the opinion which at present I entertain upon the case. Here is a tradesman who has suffered a loss to a large amount in consequence of his having been induced to give credit to a third person; and by this action he calls on the defendant through whose misrepresentation the loss was incurred to make it good. The plaintiff's son knowing nothing at the time of Miss Robertson, who had been recommended to the plaintiff by the defendant to buy goods of him in the way of his trade, makes the most particular inquiries concerning her credit to all which the defendant answers on several occasions in the most positive terms, that she was a trustworthy person to his own knowledge. The plaintiff's brother, not satisfied with this, puts the question expressly to the defendant, whether he stated this upon hearsay or of his own knowledge, drawing his attention therefore to the subject in the most particular manner; to which the defendant again replies: "I can positively assure you of my own knowledge that you may credit Miss Robertson to any amount with perfect safety." The question then is, whether that representation were true or false. No doubt it was a gross falsity. She was not a person to be credited with safety, nor had he any knowledge that she was so; and it is a juggle to say that the words in common parlance do not import knowledge in the strict sense of it. They were so understood between the parties at the time, and the plaintiff has suffered a loss in consequence of it. * * * It was enough to state that the case rested on this, that the defendant affirmed that to be true within his own knowledge which he did not know to be true. This is fraudulent; not perhaps in that sense which affixes the stain of moral turpitude on the mind of the party, but falling within the notion of legal fraud, such as is presumed in all the cases within the statute of

frauds. The fraud consists not in the defendant's saying that he believed the matter to be true, or that he had reason so to believe it, but in asserting positively his knowledge of that which he did not know. * * *

GROSE, J. * * * I consider what was said by the defendant upon the several occasions, as no more than asserting his opinion of the credit of Miss Robertson; an opinion which he seems to have fairly entertained. It is true that he asserted his own knowledge upon the subject; but consider what the subject matter was of which that knowledge was predicted; it was concerning the credit of another, which is a matter of opinion. When he used those words, therefore, it is plain that he only meant to convey his strong belief of her credit, founded upon the means he had of forming such an opinion and belief. There is no reason for us to suppose that at the time of making those declarations he meant to tell a lie and mislead the plaintiff. He himself had trusted her before to a considerable amount. He had no reason to know otherwise than what he expressed in the sense I understand him to have used it. He had for some time before seen many other persons treat Miss Robertson as a person of fortune. He himself saw her living in affluence. He had seen plans of her supposed estate in Scotland; and had observed other circumstances, altogether well calculated to delude him. I cannot say that I should not also have been duped by the same appearance. Then it is also a circumstance in the case, that he does not appear to have any interest in misrepresenting the matter to the plaintiff otherwise than as it really appeared to him. And taking the whole together, I think the evidence goes no further than his asserting that to his firm belief and conviction she was deserving of credit; and that the defendant was himself a dupe to appearances. * * *

LAWRENCE, J. * * * If this case had gone to the jury on the ground of fraud, I cannot say there would have been no evidence to support the verdict; but the case went to them on the ground, that though the defendant were himself a dupe, yet if the representation made by him were false, he was answerable. Then the question is, whether if a person assert that he knows such an one to be a person of fortune, and the fact be otherwise, although the party making the assertion believed it to be true,

an action will lie to recover damages for an injury sustained in consequence of such misrepresentation? It does not appear that any of the Judges went this length in Pasley v. Freeman. Stress has been laid on the defendant's assertion of his own knowledge of the matter; but persons in general are in the habit of speaking in this manner without understanding knowledge in the strict sense of the word in which a lawyer would use it. This observation, will not only apply to ordinary men in common conversation, but also to persons of the best information. If any man should say that he knows there is no city larger than London, it must be understood that he is speaking only from information and belief upon such a subject, and not from actual mensuration. The same must be understood when one is speaking of his knowledge of the credit of another. * * *

Le Blanc, J. concurred with Grose and Lawrence, J.

Rule absolute.

Who May Rely on the Representation.

EATON, COLE & BURNHAM CO. v. AVERY.

83 N. Y. App. 31. 1880.

RAPALLO, J. This is an action for deceit, in obtaining the sale and delivery of goods to the firm of Avery & Riggins, by means of false representations made by the defendant as to the pecuniary condition of his firm. The representations charged were not made directly by the defendant to the plaintiff, but are alleged to have been made by him to a mercantile agency (Dun, Barlow & Co.), or its agent, and by it communicated to the plaintiff, who claims that it delivered the goods to Avery & Riggins on credit, on the faith of such representations. The counsel for the defendant contends that the plaintiff cannot maintain an action against the defendant for false representations made by him to Dun, Barlow & Co., or its agent, and that such representations, assuming them to have been made, are not sufficiently connected with the dealing between the defendant and the plaintiff to enable the latter to recover by reason thereof. On this point we are of opinion that the law was correctly stated by the learned judge before whom the trial was had, in his charge to the jury, wherein he instructed them that if the defendant, when he was called upon by the agent of Dun,

Barlow & Co., made the statements alleged in the complaint as to the capital of the firm of Avery & Riggins, and they were false, and so known to be by the defendant, and were made with the intent that they should be communicated to and believed by persons interested in ascertaining the pecuniary responsibility of the firm, and with intent to procure credit and defraud such persons thereby, and such statements were communicated to the plaintiff and relied upon by it, and the alleged sale was procured thereby, the plaintiff was entitled to recover. The rule thus laid down accords with the principles of adjudications in analogous cases in which it has been held that it is not essential that a representation should be addressed directly to the party who seeks a remedy for having been deceived and defrauded by means thereof. Gazeaux v. Mali, 25 Barb. 578; Newberry v. Garland, 31 Id. 121; Burff v. Mali, 36 N. Y. 200; Morgan v. Skiddy, 62 Id. 319; Commonwealth v. Call, 21 Pick 515, 523; 32 Am. Dec. 284; Commonwealth v. Harley, 7 Metc. 462. The principle of these cases is peculiarly applicable to the case of statements made to mercantile agencies. Proof was given on the trial as to the business and office of these agencies but they are so well known, and have been so often the subject of discussion in adjudicated cases, that the courts can take judicial notice of them. Their business is to collect information as to the circumstances, standing and pecuniary ability of merchants and dealers throughout the country, and keep accounts thereof, so that the subscribers to the agency when applied to by a customer to sell goods to him on credit, may by resorting to the agency or to the lists which it publishes, ascertain the standing and responsibility of the customer to whom it is proposed to extend credit. A person furnishing information to such an agency in relation to his own circumstances, means and pecuniary responsibility, can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining it, for their guidance in giving credit to the party; and if a merchant furnishes to such an agency a willfully false statement of his circumstances or pecuniary ability, with intent to obtain a standing and credit to which he knows that he is not justly entitled, and thus to defraud whoever may resort to the agency, and in reliance upon the false information there lodged, extend a credit to him, there is no reason why his liability to

any party defrauded by those means should not be the same as if he had made the false representation directly to the party injured.

The counsel for the appellant is undoubtedly right in his general proposition that a false representation made to one person cannot give a right of action to another to whom it may be communicated, and who acts in reliance upon its truth. If A. casually or from vanity makes a false or exaggerated statement of his pecuniary means to B., or even if he does so with intent to deceive and defraud B., and B. communicated the statement to C., who acts upon it, A. cannot be held as for a false representation to C. But if A. makes a statement to B. for the purpose of being communicated to C., or intending that it shall reach and influence him, he can be so held. In Commonwealth v. Call, 21 Pick. 515; 32 Am. Dec. 284, the court say on this point at page 523, that the representation was intended to reach P. and operate upon his mind; that it did reach him; and produced the desired effect upon him, and that is was immaterial whether it passed through a direct or circuitous channel.

* * * * * * * * *

Value.

BISHOP v. SMALL.

63 Maine 12. 1874.

Case for deceit in the sale of the right to make and sell a patented churn for the States of Kentucky and West Virginia. The plaintiff was non-suited.

PETERS, J. The plaintiff seeks to recover damages for a deceit in the sale of a patent right. The representations of the defendant, relied upon, were substantially these:—that the patent right was a "good thing," "of great utility and benefit, and popular," that "it was in great demand, and that the defendant had been offered $40,000 for it, for the territory of Pennsylvania;" that he had "sold one-quarter of the right for the territory of Pennsylvania, for $4,000;" that "it had been rapidly sold, and he had himself bought additional interests in it at great prices, and that he and others had made large sums of money in making sales of it;" that "the plaintiff could sell it upon the territory for which he was to have it, and, if he did

not succeed, that he would go and sell it for him, and would assure him that he would make a large amount from the transaction." The plaintiff avers that the right was of no value; in no demand; and that it could not be sold, and that the defendant knew it to be so. He does not contend that the article has no efficiency as a churn; but contends that it has no superior advantages in those respects for which it was patented.

We are of the opinion that these representations are not actionable. When analyzed, they seem to consist of the opinion of the defendant as to the value of the property sold; or relate to the price that was given for it; or which had been offered for it; or prices at which it had been sold; or to the future profits that could be made out of it. All the representations complained of were mere loose, exaggerated, vague and indefinite recommendations which a vendor is likely to make of property of this description, which he is desirous to sell, and so plainly so, that a person in the use of ordinary care should not be deceived by them. Caveat emptor applies. It is not so much that such representations are not enough to amount to fraud and imposition, but that they are, so to speak, too much for that purpose. Most of them are too preposterous to believe. None of them are representations of facts, affecting the quality of the article sold, known to the vendor, but unknown to the vendee, and such as a vendee using common care would be deceived by. They are only "dealer's talk." This is the well settled doctrine in this State and Massachusetts. Long v. Woodman, 58 Maine, 49; Holbrook v. Connor, 60 Maine, 578.

Exceptions overruled.

DEMING v. DARLING.

148 Mass. 504. 1889.

HOLMES, J. This is an action for fraudulent representations alleged to have been made to one Dr. Jordan, the plaintiff's agent, for the purpose of inducing the plaintiff to purchase a railroad bond from the defendant. * * *

Among the representations relied on, one was that the railroad mortgaged, which was situated in Ohio, was good security for the bonds; and another was that the bond was of the very best and safest, and was an A. No. 1 bond. * * *

It will be seen that the fundamental difference between the instructions given and those asked is that the former require good faith. The language of some cases certainly seems to suggest that bad faith might make a seller liable for what are know as seller's statements, apart from any other conduct by which the buyer is fraudulently induced to forbear inquiries. Pike v. Fay, 101 Mass. 134. But this is a mistake. It is settled that the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation, (Teague v. Irwin, 127 Mass. 217,) and as to which it always has been "understood" the world over, that such statements are to be distrusted. Brown v. Castles, 11 Cush. 348, 350. Gordon v. Parmelee, 2 Allen, 212. Parker v. Moulton, 114 Mass. 99. Poland v. Brownell, 131 Mass. 138, 142. Burns v. Lane, 138 Mass. 350, 356. Parker v. Moulton also shows that the rule is not changed by the mere fact that the property is at a distance, and is not seen by the buyer. Moreover, in this case, market prices at least were easily accessible to the plaintiff.

The defendant was known by the plaintiff's agent to stand in the position of seller. If he went no further than to say that the bond was an A. No. 1 bond, which we understand to mean simply that it was a first rate bond, or that the railroad was good security for the bonds, we are constrained to hold that he is not liable under the circumstances of this case, even if he made the statement in bad faith. See, further, Veasey v. Doton, 3 Allen, 380; Belcher v. Costello, 122 Mass. 189. The rule of law is hardly to be regretted, when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value when the expectation has been disappointed.

HARVEY v. YOUNG.

39 Yelverton 21. (Eng.).

F. S. had a term for years, and there being a discourse between him and F. D. about buying that term, F. S. said and affirmed to F. D. that the term was worth 150£ to be sold, upon which F. D. gave F. S. 150£ for the term; And afterwards F.

D. offered and endeavored to sell the term again, and could not obtain, nor get for the term 100£ whereupon he brought an action on the case in nature of a deceit against F. S. and declared ut supra, and that F. S. asseruit to him that the term was worth so much, to which assertion F. D. Fidem adhibens, did buy the term for so much money, but could not sell it again for so much money as was given at first in fraud and deceit of the plaintiff to his damages, etc. and upon not guilty pleaded, it was found for the plaintiff, and alledged in arrest of judgment, that the matter precedent did not prove any fraud; for it was but the defendant's bare assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion. But if the defendant had warranted the term to be of such value to be sold, and the plaintiff had thereupon given and disbursed his money, there it is otherwise; for the warranty given by the defendant is a matter to induce confidence and trust in the plaintiff. Between Harvey and Young. Mich. 39 Eliz. as Towes of the Inner Temple said at the bar, that he was of counsel with the defendant. Quod Nota.

Scienter.

DERRY v. PEEK.

Law Reports, 14 Appeal Cases 337. 1889.

Action by Peek against the Chairman and four directors of the Plymouth, Davenport and District Tramways Company, claiming damages for fraudulent misrepresentations whereby the plaintiff was induced to take shares in the company. The misrepresentations were contained in a prospectus and circular issued by the directors, which stated that the Company had the right to use steam or other mechanical power instead of horses. The incorporating act provided that the Company might use steam or other mechanical power, if they should obtain the consent of the Board of Trade, and of the corporations of Plymouth and Davenport; but the corporation of Davenport and the Board of Trade refused to give such consent. Among other defences, the defendants pleaded that if the statements complained of were untrue, they were made by the defendants in good faith and that they had reasonable grounds for believing

them to be true. At the hearing, Sterling, J., dismissed the action. On appeal by the plaintiff, the Court of Appeal reversed this judgment. Cotton, L. J., and Lopes, J., said in part:

COTTON, L. J. * * * Now I do not propose to enter into a discussion as to whether legal fraud is a happy expression. It is not one which I should adopt; but the question is whether there is not a duty on the part of those who make statements to be acted upon by others, and whether there is not a right in those persons to whom the statements are made. In my opinion there is a duty. When a man makes statements which he desires that others should act upon, especially when they are in a prospectus like the present, intended to be circulated among the public in order to induce them to take shares—in my opinion there is a duty cast upon the director or other person who makes those statements to take care that there are no expressions in them which, in fact, are false; to take care that he has reasonable ground for the material statements which are contained in the document which he prepares and circulates for the very purpose of its being acted upon by others. And although, in my opinion, it is not necessary that there should be what I should call fraud, yet, in these actions, according to my view of the law, there must be a departure from duty; and in my opinion when a man makes an untrue statement with an intention that it shall be acted upon without any reasonable ground for believing that statement to be true, he makes default in a duty which was thrown upon him from the position he has taken upon himself, and he violates the right which those to whom he makes the statement have to have true statements only made to them. And I should say that when a man makes a false statement to induce others to act upon it, without reasonable ground to suppose it to be true, and without taking care to ascertain whether it is true, he is liable civilly as much as a person who commits what is usually called fraud, and tells an untruth knowing it to be an untruth.

* * * * * * * * *

LOPES, L. J. This case is a case of such importance that I desire to state my view of the law, although I in no way dissent from the law as it has been stated, nor from the result arrived at. This is an action of deceit. It is true that there are different degrees of moral delinquency, but I know of no fraud which

will support an action of deceit to which some moral delinquency does not belong. An action for deceit will not lie for an innocent misrepresentation, for such misrepresentation is not fraudulent. On the other hand, a slight degree of what I will call moral obliquity will suffice to render a misrepresentation fraudulent in contemplation of law. And let me say this is what I understand by the expression which is so often used in the authorities, and which has been referred to by Sir James Hannen, I mean the expression "legal fraud." I will endeavor shortly to state what I believe to be the result of the cases. The law I venture to say is well settled and well understood. I think the result of the cases amounts to this. If a person makes to another a material and definite statement of a fact which is false, intending that person to rely upon it, and he does rely upon it and is thereby damaged, then the person making the statement is liable to make compensation to the person to whom it is made—first, if it is false to the knowledge of the person making it; secondly, if it is untrue in fact and not believed to be true by the person making it; thirdly, if it is untrue in fact and is made recklessly, for instance without any knowledge on the subject, and without taking the trouble to ascertain if it is true or false; fourthly, if it is untrue in fact but believed to be true, but without any reasonable grounds for such belief. I believe that to be a fair statement of what the result of the cases is. * * *

The defendants appealed to the House of Lords, who reversed the judgment of the Court of Appeals and restored that of Sterling, J.

LORD HERSCHELL said in part: * * * "This action is one which is commonly called an action of deceit, a mere common law action." This is the description of it given by Cotton L. J. in delivering judgment. I think it is important that it should be borne in mind that such an action differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an

action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. * * *

It will thus be seen that all the learned judges concurred in thinking that it was sufficient to prove that the representations made were not in accordance with fact, and that the person making them had no reasonable ground for believing them. They did not treat the absence of such reasonable ground as evidence merely that the statements were made recklessly, careless whether they were true or false, and without belief that they were true, but they adopted as the test of liability, not the existence of belief in the truth of the assertions made, but whether the belief in them was founded upon any reasonable grounds. It will be seen, further, that the Court did not purport to be establishing any new doctrine. They deemed that they were only following the cases already decided, and that the proposition which they concurred in laying down was established by prior authorities. * * *

Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

* * * * * * * * *

In my opinion, making a false statement through want of care falls far short of, and is a very different thing from fraud, and the same may be said of a false representation honestly believed though on insufficient grounds. Indeed Cotton, L. J., himself indicated, in the words I have already quoted, that he should not call it fraud. But the whole current of authorities, with which I have so long detained your Lordships, shews to my mind conclusively that fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed.

* * * * * * * * *

At the same time, I desire to say distinctly that when a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord Blackburn, in Brownlie v. Campbell,[1] a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

I have arrived with some reluctance at the conclusion to which I have felt myself compelled, for I think those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea. I think there is much to be said for the view that this moral duty ought to some extent to be converted into a legal obligation, and that the want of reasonable care to see that statements, made under such circumstances, are true, should be made an actionable wrong. But this is not a matter

[1] 5 App. Cas., at p. 952.

fit for discussion on the present occasion. If it is to be done, the legislature must intervene and expressly give a right of action in respect of such a departure from duty. It ought not, I think, to be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent whether his acts can or cannot be justly so alleged. * * *

CHAPTER III.

THE EFFECT UPON THE PLAINTIFF.

Relying Upon the Representation.

SLAUGHTER'S ADM'R v. GERSON.

13 Wall. 379 (U. S.). 1872.

The defendant purchased of the plaintiff, a steamboat for $40,000, giving as security for a part of the purchase price a mortgage upon the boat purchased and another steamboat. Bill by the plaintiff to foreclose the mortgages. In his answer, the defendant set up fraud as a defense, consisting in false representation as to the draught of the boat purchased.

FIELD, J. * * * This misrepresentation which will vitiate a contract of sale, and prevent a court of equity from aiding its enforcement, must not only relate to a material matter constituting an inducement to the contract, but it must relate to a matter respecting which the complaining party did not possess at hand the means of knowledge and it must be a misrepresentation upon which he relied, and by which he was actually misled to his injury. A court of equity will not undertake, any more than a court of law, to relieve a party from the consequence of his own inattention and carelessness. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another. Volenti non fit injuria is the maxim in such cases in all courts. And the same reasoning applies when the com-

plaining party does not rely upon the misrepresentations, but seeks from other quarters means of verification of the statements made, and acts upon the information thus obtained.

The facts disclosed by the uncontradicted testimony of both parties bring this case clearly within the principle here stated. Previous to the execution of the contract of purchase and with the view of examining the steamboat the defendant went from Baltimore to New York, taking with him his son, who subsequently became captain of the boat, and two ship-carpenters, and a square to measure her draught of water. Whilst there every opportunity was given him to examine the boat with his carpenters, and a most thorough and careful examination was made by them. On two occasions they measured the draught of the boat, and they witnessed her speed by accompanying her on one of her trips. The owner went with them to the boat on their arrival in New York, and told them to look for themselves, and to go anywhere they pleased about her. If, under these circumstances, the defendant did not learn everything about her, and ascertain her true draught, it was his own fault, and it would be against the plainest principles of justice to allow him to set up, in impeachment of the validity of his contract, loose statements respecting the draught before its execution, even though they were false in point of fact.

In Attwood v. Small, 6 Cl. & F. 262, the doctrine was laid down by the House of Lords after great consideration substantially as we have stated it. In that case, the defendant had sold to the complainants, constituting a company of numerous persons, certain freehold and leasehold property, including mines and iron works, and had made certain statements respecting the capabilities of the property. The purchasers, not relying upon these statements, deputed some of their directors, together with experienced agents, to ascertain the correctness of his statements. These persons examined the property and works and the accounts kept by the defendant, receiving from him and his agents every facility and aid for that purpose, and they reported that the defendant's statements were correct. Upon a bill filed to rescind the contract, on the ground of fraud, the House of Lords decided that the contract could not be rescinded, reversing, in that respect, the decree of the Court of Exchequer, not merely because there was no proof of fraud, but because the purchasers did not

rely upon the vendor's statements, but tested their accuracy, and after having knowledge, or the means of knowledge, declared they were satisfied with their correctness; holding that if a purchaser, choosing to judge for himself, did not avail himself of the knowledge, or means of knowledge, open to him or to his agents, he could not be heard to say he was deceived by the vendor's representations, the doctrine of caveat emptor, applying in such case, and the knowledge of his own agents being as binding as his own knowledge.

The doctrine, substantially as we have stated it, is laid down in numerous adjudications. Where the means of information are at hand and equally open to both parties, and no concealment is made or attempted, the language of the cases is, that the misrepresentation furnishes no ground for a court of equity to refuse to enforce the contract of the parties. The neglect of the purchaser to avail himself, in all such cases, of the means of information, whether attributable to his indolence or credulity, takes from him all just claim for relief. * * *

LEADING ILLUSTRATIVE CASES LAW OF TORTS

PART V

DEFAMATION

CHAPTER I.

ORIGIN AND DEFINITION.

Defamation as a Law Term.

JOHNSON'S ADM'X v. HALDEMAN.

102 Ky. 163, 43 S. W. 226. 1897.

This was an action by Johnson against Haldeman for libel. From a judgment dismissing the action upon the death of plaintiff, the plaintiff's administratrix appealed.

BURNAM, J. The only question in this case is whether an action for libel survives the death of the plaintiff. Appellees were sued by Andrew Johnson for publishing an alleged libel against him. Before trial, he died, and his administratrix moved the court to revive the action in her name. This the court refused to do; holding that the action was embraced by the provisions of Section 10 of the Kentucky Statutes, under the word "slander." By that section, actions for slander do not survive. As libel is not named in that section, the question is, does the word "slander" embrace libel? The word "slander" is the general and original word for all kinds of defamation. One can be defamed by words spoken, words written, or by signs or pictures, and when so defamed, it is called slander; and the word "slander" in the statute, we think, was intended to embrace all these varieties of defamation. There is nothing in the statute which shows that the word was intended to be limited

in its meaning to oral slander. Webster defines "slander" as defamation generally, whether oral or written, but goes on to say that in modern usage it has been limited to defamation by words spoken.

Bac. Abr. says: "Slander is the publishing of words, in writing or by speaking, by reason of which the person to whom they relate becomes liable to suffer some corporal punishment." Esp. N. P. 496, says, in regard to the action of slander: "Slander is the defaming a man in his reputation, by speaking or writing words from whence any injury in character or property arises, or may arise, to him of whom the words are used, and may be committed—first, by words; second, by writing (which is called 'libel'); third, by picture, or representation of that sort." Folkard Starkey says: "The term 'slander' was formerly used to embrace written as well as oral defamation." 2 Kent's Comm., p. 16, draws the distinction between spoken and written slander, treating the word "slander" as comprehensive enough to embrace both oral and written defamation. It has never been the policy of the law to keep alive action of this character after the death of the plaintiff. For the reasons indicated, the judgment of the lower court is affirmed.

Defamation Distinguished From Kindred Legal Wrongs.

GOTT v. PULSIFER.

122 Mass. 235. 1877.

TORT. The declaration alleged that, at the time of the publication hereinafter referred to, the plaintiff was the owner of a certain stone figure or image, being or resembling a colossal statue of a man, which statue, figure, or image, was formally exhumed at Cardiff in the state of New York, and was publicly known as the "Cardiff Giant" or "Onondaga Statue"; that the statue was of great value to the plaintiff as a scientific curiosity and for the purpose of exhibiting the same as such a curiosity, and had long been a source of great gain and profit to the plaintiff by exhibiting the same as a public show; that the defendants were on November 13, 1873, the proprietors and publishers of a certain newspaper published in Boston, to wit,

the Sunday Herald; that on that day the defendants published in their said paper a certain false, scandalous and malicious libel of and concerning the plaintiff, and of and concerning his said property, to wit, his said statue, figure, or image, in the words following:

"The sale of the Cardiff Giant, so called, at New Orleans, for the small price of eight dollars, recalls the palmy days of that ingenious humbug. We well remember the learned remarks made by the connoisseurs in this city when it was exhibited in a vacant store, quite near our office. While the vulgar herd only looked on in silence, seeing a colossal figure which excited their curiosity, but which they did not attempt to explain, the Harvard professors and other learned men traced its pedigree by their knowledge of artistic history, and constructed theories as to its origin, which at once displayed their erudition, and helped to advertise the show. But our professors and learned men were not the only victims of the sell.

A distinguished professor of Yale discussed learnedly upon it in the Galaxy Magazine. He demonstrated beyond a doubt that the statue was authentic, that it was antique, and that it was a colossal monolith. He ciphered it down that it was a Phœnician image of the god Baal, and found no difficulty in proving to his own satisfaction that it was brought to America by a Phœnician party of adventurers, who sailed in one of the ships of Tarshish, and that it was buried by the idolaters to save it from desecration by the hordes of savages who overpowered and destroyed the Phœnicians. He accounted for several marks and symbols upon the image, which were unmistakably Phœnician. Not long afterwards the man who brought the colossal monolith to light, confessed that it was a fraud, and the learned gentlemen, who had indorsed its authenticity, were left as naked as the statue itself."

The declaration then alleged that the statue had never been sold in New Orleans for $8, and that it had never been there; that, by reason of said libel, the plaintiff was prevented from selling his said statue, and thereby caused to lose $30,000, and that one Thomas Palmer had, prior to the publication of said libel, agreed to purchase said statue and to pay therefor the sum of $30,000, but that by reason of said libel said Palmer

was caused and induced to refuse to carry out his agreement, and wholly abandoned the same.

At the trial in the Superior Court, before Rockwell, J., the publication of the article was admitted by the defendants and also the fact that it referred to the plaintiff's statue. Both the plaintiff and Palmer testified that the latter agreed in writing to purchase one-half of the statue, and offered for the same real estate, worth at the time of the agreement, $17,000, and that on account of the defendant's publication he refused to carry out his agreement.

The plaintiff introduced evidence tending to show that the statement in regard to the sale at New Orleans was false, and offered evidence concerning the value of the statue as a scientific curiosity; but the judge ruled that the question of its value in that respect, or for purposes of exhibition, was immaterial.

The only evidence put in by the defendants was that one of them testified that he wrote the article as a humorous comment on an article which he saw in the "Chicago Tribune," purporting to give a detailed account of the sale of the Cardiff Giant at New Orleans for $8, and commenting at length thereon; and that he did not know the plaintiff and wrote without malice.

GRAY, C. J. This action is not for libel upon the plaintiff, but for publishing a false and malicious statement concerning his property, and could not be supported without allegation and proof of special damage. Malachy v. Soper, 3 Bing. N. C. 371; S. C. 3 Scott. 723. Swan v. Tappan, 5 Cush. 104. The special damage alleged was the loss of the sale of the plaintiff's statue to Palmer. Evidence of the value of the statue as a scientific curiosity or for purposes of exhibition were, therefore, rightly rejected as immaterial.

The editor of a newspaper has the right, if not the duty, of publishing, for the information of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; and such a publication falls within the class of privileged communications for which no action can be maintained without proof of actual malice.

But in order to constitute such malice, it is not necessary that

there should be direct proof of an intention to injure the value of the property; such an intention may be inferred by the jury from false statements, exceeding the limits of fair and reasonable criticism, and recklessly uttered in disregard of the rights of those who might be affected by them. Malice in uttering false statements may consist either in a direct intention to injure another, or in a reckless disregard of his rights and of the consequences that may result to him.

The only definition of malice given by the learned judge who presided at the trial was therefore erroneous, because it required the plaintiff to prove "a disposition wilfully and purposely to injure the value of this statue," as well as "wanton disregard of the interest of the owner." The jury, upon the evidence before them, and under the instruction given them, may have been of opinion that the defendants' statements that the plaintiff's statue was an "ingenious humbug," "a sell" and "a fraud," were false, reckless and unjustifiable, and had the effect of injuring the plaintiff's property, and caused him special damage; and may have returned their verdict for the defendants solely because they were not convinced that they intended such injury.

As the instructions given were erroneous in this particular, and we cannot know that the error did not affect the verdict, the plaintiff is entitled to a new trial, in order that he may satisfy a jury, if he can, under proper instructions, that he has a good cause of action against the defendants.

CHAPTER II.

BY AND AGAINST WHOM DEFAMATION MAY BE BROUGHT.

Who May Sue.

BRADT v. NEW NONPAREIL CO.

108 Iowa 449, 79 N. W. 122. 1899.

This was an action for an alleged libel. A demurrer to the petition was sustained in the trial court, and the plaintiff appealed.

DEEMER, J. The only question presented by this appeal is this: May a mother recover damages for a libel published of and concerning an adult son, published after his decease? The damages sought to be recovered in this action are for humiliation, shame, and mental anguish of the mother caused by an alleged libellous publication concerning her deceased son, George Bradt. The publication, which is set forth in the petition, is undoubtedly libellous per se. But the pivotal question is, may plaintiff recover damages therefor? Section 5086 of the Code makes it a crime to maliciously blacken or vilify the memory of one who is dead by a libellous publication tending to scandalize or provoke his surviving relatives or friends; and there is no doubt that for the publication set out in plaintiff's petition defendant was subject to a criminal prosecution, provided the article was published without sufficient justification. But is it liable civilly to the mother of the deceased? She does not sue in a representative capacity, and, if she had, she could not recover, for it is manifest no injury was done to the estate of her deceased son. It seems that contemptuous demeanor towards a corpse was, by the Roman law, an insult to the heir of the deceased, and that action could lie therefor. Dig. 47, 10, 11. The rule that an heir may recover for a libel of one deceased does not seem to have gained a foothold in this country, and we

know of no principle that will sustain such an action. There was nothing in the article which tended in any manner to reflect on the plaintiff, and her sufferings were of the same kind as that produced by publication upon any of the other relatives or close friends of deceased. To permit a recovery in this case would allow the mother of any person libelled to bring suit in her own name for the consequential damages done to her feelings, and the death of the person libelled would be a wholly irrelevant matter; for the suffering is in kind the same whether the person libelled be living or dead. We have not been cited to an authority, and, after a diligent search, we have been unable to find one, which authorizes a recovery in such a case. On the other hand, the following cases hold such action will not lie: Sorensen v. Balaban (Sup.), 42 N. Y. Supp. 654; Wellman v. Publishing Co., 21 N. Y. Supp. 577, 66 Hun 331. The trial court correctly sustained the demurrer, and its judgment is affirmed.

OHIO & MISSISSIPPI RY. CO. v. PRESS PUB. CO.

48 Fed. 206. 1891.

The Ohio & Mississippi Railway Company sued the Press Publishing Company for libel. The defendant demurred to the complaint, on the ground that "it appears on the face of the complaint that the said complaint does not state facts sufficient to constitute a cause of action." Plaintiff moved for judgment on the demurrer as frivolous.

LACOMBE, Circuit Judge. The demurrant has wholly mistaken the cause of action set forth in the complaint. Defendant's publication is not declared upon as a "libel on a thing." A corporation, though an artificial person, may maintain an action for libel; certainly for language concerning it in the trade or occupation which it carries on. Insurance Co. v. Perrine, 23 N. J. Law, 402; Mutual Reserve Life Ass'n v. Spectator Co., 50 N. Y. Super. Ct. 460; Omnibus Co. v. Hawkins, 4 Hurl. & N. 87, 146; Bank v. Thompson, 18 Abb. Pr. 413. It is elementary law that every legal occupation from which pecuniary benefit may be derived creates such special susceptibility to injury by language charging unfitness or improper conduct of

such occupation that such language is actionable, without proof of special damage.

The complaint avers that plaintiff is a railway corporation, duly organized and existing under the law of the states of Ohio, Indiana, and Illinois, and a common carrier of goods and passengers, and that it maintains and operates certain lines of railroad. The occupation of the plaintiff, therefore, is the proper, safe, and businesslike maintenance and operation of its railroad, so that it may reasonably discharge its duties as such common carrier of goods and passengers. Language which charges the plaintiff with such incapacity or neglect in the conduct of its business that belief in the truth of the charges would, as a natural and proximate consequence, induce shippers of goods and passengers to refrain from employing the plaintiff as such common carrier, is actionable without proof of special damage. The particular language complained of here is the statement in the defendant's newspaper that "over one-half of the ties in the roadbed (of the plaintiff) are rotten, and it is dangerous to run trains very fast." Such a publication is manifestly within the principle above laid down; and, as the complaint further avers that the statement was "false, * * * malicious, and made for the purpose of injuring the credit and business of the plaintiff," a cause of action is set forth in the complaint.

Motion for judgment on the demurrer as frivolous is granted.

CHAPTER III.

THE TWO SPECIES OF DEFAMATION.

The Scope of Slander.

FINDLAY v. BEAR.

8 S. & R. 571 (Pa.). 1822.

This was an action of slander brought by Daniel Bear. The declaration set forth that the defendant uttered and published, of and concerning the plaintiff, the following words: "Daniel Bear pilfered a dog, and peddled the dog through the country, and then sold him to John Levingood for $5." The jury found a verdict in favor of the plaintiff for $37; and a motion in arrest of judgment having been overruled by the court, the defendant took out this writ of error.

TILGHMAN, C. J. This is an action of slander, and the only question is whether the words laid in the declaration are actionable. The words were, "That the plaintiff stole a dog." The objection is, that a dog is not a subject of felony, and, therefore, it was impossible the plaintiff should steal one. It is conceded by the counsel for the plaintiff that, by the common law, a dog is not that kind of property of which there can be a felony. It is so laid down by Hale and Hawkins, who have been followed by all subsequent writers on criminal law. But it is contended, that a dog is included in the general words, "goods and chattels," made use of in "the act to reform the penal laws of this state," passed the 5th of April, 1790, 2 Sm. L. 531. By the fourth section of this law, it is enacted, that "if any person shall feloniously steal, take and carry away any goods or chattels, under the value of twenty shillings, and be thereof legally convicted, he shall be deemed guilty of petty larceny," &c. But there is no reason for supposing that it was intended by this act to extend the crime of larceny beyond its ancient limits. That would be a regular construction of a law, and the object of which was to mitigate the penal code. By the words "any

goods or chattels," we are to understand any such goods or chattels as have been esteemed subjects of larceny. This will be clear enough when we consider that, in another section of the same act, it is provided, that robbery or larceny of any bonds, bills, &c., shall be punished in the same manner as robbery or larceny of any goods or chattels. Bonds, bills, &c., are goods or chattels; and yet it was thought necessary to declare them subjects of felony, by a special provision; which shows that the words "goods or chattels" before mentioned were to be taken, not in their most extensive signification, but according to their usual import in the criminal law.

Constructive felonies are odious and dangerous. It is time enough for the court to say that a thing is a felony, when the legislature has plainly declared it. The owners of dogs are not without remedy, against those who take them away. They may recover ample damages in a civil action. It is the opinion of the court, therefore, that there can be no felony of a dog. Consequently, the words laid in the declaration in this case, are not actionable; and the judgment must be reversed.

WHITTAKER v. BRADLEY.

7 Dowl. & Ry. 649 (Eng.). 1826.

Case for words of and concerning the plaintiff as an innkeeper: "He is a bankrupt; he will be in the Gazette in twelve months; he is a pauper." Plea, the general issue, and verdict for the plaintiff at the sittings before Abbott, C. J., in London, after last term.

Marryat now moved to arrest the judgment, upon the ground that an innkeeper, as such, not being liable to the bankrupt laws, these words were not actionable, and he cited Collis v. Malin, Cro. Car. 282; Arundel v. Mare, 1 Vin. Ab. 472; Anonymous, Bulst. 40; Walgrave and Agars, 1 Leon. 335; Emerson v. Fairfax, 1 Sid. 299.

ABBOTT, C. J. The single question is, whether language importing that a man who gets his living by buying liquors and other articles fit for the entertainment of man, and furnishes his house with them in order that he may be ready to supply his guests, is unable to pay his debts, is actionable; or, in other

words, whether such a man may be prejudiced by slander of that description, he not being subject to the bankrupt laws. May not a man be as much prejudiced by such words as if he were actually subject to the bankrupt laws; if his credit be affected by such an imputation on his solvency? I think, according to all principles on which actions of slander lie, this action is maintainable, though the plaintiff be not liable to the statute concerning bankrupts.

BAYLEY, J. The principle on which this species of action is maintainable is, that the slander has the effect of producing temporal damage to the party complaining. It is upon this principle that an imputation of ignorance upon a councillor or an attorney is actionable, because it has a tendency to prejudice him in his profession. So if a man seek his living by keeping an inn, is he not likely to be affected by an imputation upon his credit? In Southam v. Allen, Sir T. Raym. 231, the plaintiff being an innkeeeper, the defendant said of him, "deal not with him, for he is broke, and there is neither entertainment for man or horse," and it was held that these words were actionable. Whatever words have a tendency to hurt, or are calculated to prejudice a man who seeks his livelihood by any trade or business, are actionable. Reid v. Hudson, 1 Ld. Raym. 610, the plaintiff being a laceman, declared in case for these words: "You are a rascal, you are a pitiful sorry rascal, you are next door to breaking;" and being laid to have spoken of the plaintiff in his trade, they were held actionable, without any averment of special damage.

Rule refused.

OAKLEY v. FARRINGTON.

1 Johns. Cas. 129 (N. Y.). 1799.

This was an action of slander. The plaintiff in the declaration was stated to be a justice of the peace, and the slanderous words were charged to have been spoken of him in relation to his office. Among others the following words were charged, and on the trial before Mr. Justice Benson, at the last Westchester circuit, were proved to have been spoken by the defendant: "Squire Oakley (meaning the plaintiff) is a damned rogue." It did not appear from any circumstance that these

words were spoken of the plaintiff in his official capacity. The appellation of "squire" was intended to designate him merely, and was that by which he was usually distinguished from others of the same surname in the part of the country where the parties resided. The defendant on the trial moved for a nonsuit, on the ground that the words so spoken were not actionable; which motion was overruled for the purpose of taking a verdict and referring the question. A verdict was accordingly taken for the plaintiff, subject to the opinion of the court; and it was agreed if that opinion should be against the plaintiff, that a nonsuit should be entered.

PER CURIAM. These words spoken of a common person are held not to be actionable. Although in this case they were spoken of a magistrate, they had no relation to his official character or conduct. They are therefore not more actionable than if he was not in office, or if they were spoken of any other individual.

Judgment of nonsuit.

LODGE v. O'TOOLE.

20 R. I. 405, 39 Atl. 752. 1898.

Trespass on the case for slander. Heard on defendant's motion in arrest of judgment after verdict for the plaintiff.

MATTESON, C. J. The slander complained of is that the plaintiff was intoxicated to such a degree as to amount to a violation of decency. The offence of intoxication amounting to a violation of decency is not an offence at common law or by statute. It is made such merely by ordinances of the several towns and cities. In Seery v. Viall, 16 R. I. 517, it was held that, though words charging an offence involving moral turpitude and liable to punishment at common law or by statute are actionable per se, a charge of drunkenness, as it does not involve moral turpitude and is not an offence either at common law or by statute, but only by ordinance, is not actionable per se. We are of the opinion that the present suit is within this decision, and, consequently, that, as the declaration alleges no special damages, the motion in arrest of judgment must be sustained.

Judgment arrested, and case remitted to the Common Pleas Division.

TILLINGHAST, J. (concurring). I concur in the foregoing opinion, as it doubtless states the law correctly; but, while this is so, I can but express regret that there is practically no redress for such a wrong as that which is set out in the plaintiff's declaration. It alleges that the defendant publicly, falsely, and maliciously accused the plaintiff, who is a married woman and the mother of a family of children, of being drunk in a liquor saloon in North Providence, in such circumstances as to amount to a violation of decency; and the jury have found the defendant guilty as charged in said declaration. But as it is not an offence, either at common law or under our statute, for a person to be intoxicated, even though it be in a public place and in such circumstances as to violate the rules of common decency, it is, therefore, not actionable per se to falsely and maliciously accuse a person of being in such a condition. In other words, so long as it is only by virtue of a town or city ordinance and not by virtue of any statute of the state that one can be punished for drunkenness, it is no legal wrong to falsely and maliciously accuse a person, even though that person be a married woman and the mother of a family, with the offence of being indecently drunk in a public saloon, unless *special pecuniary* damages (Sedgwick on Damages, 6th ed. 675, note 3) result therefrom, which could seldom be proved. It seems to me that such a state of things may, without impropriety, be called to the attention of the legislature of the state.

MORGAN v. KENNEDY.

62 Minn. 348, 64 N. W. 912. 1895.

Appeal by defendant William Kennedy from an order of the district court for Ramsey county, Otis, J., overruling his demurrer to the complaint.

COLLINS, J. * * * It is further contended in appellant's behalf that the words set out in the complaint as those spoken by Mrs. Kennedy are not actionable per se. They were as follows: "He has been drunk throughout Thanksgiving week. He has not retired any night during that week other than in a state of drunkenness. He has drunken people in his

room. He gets people in his room and makes them drunk. He was drunk during the early hours of the morning after Thanksgiving."

Drunkenness is a crime under the laws of this state. G. S. 1894, 6949. It is punishable by indictment. It was held in St. Martin v. Desnoyer, 1 Minn. 131 (156), and again in West v. Hanrahan, 28 Minn. 385, 10 N. W. 415, that words spoken of another which, when taken in their plainest and most natural sense, as they would be ordinarily understood, obviously import the commission of a crime punishable by indictment, are actionable per se. It is barely possible that in view of the many indictable offences in this state under the present statutes, some of which reflect very slightly, if at all, upon the moral character of a person indicted, the proposition so flatly laid down in these two cases will have to be qualified; but here the misbehavior charged in the words alleged to have been used by the defendant's wife was not indictable, but involved the element of moral turpitude, and was such as to injuriously affect the social standing of the plaintiff. In view of the moral sentiment of the people of this state on the subject of drunkenness, so pronounced as to lead to the enactment of the Scheffer Law in 1889, we do not hesitate to say that moral turpitude is involved in the charge that a man has been getting other people drunk, and has himself been on a drunken debauch lasting for a week. The words uttered according to the plaintiff, were actionable per se.

Order affirmed.

The Scope of Libel.

VILLERS v. MONSLEY.

2 Wils. 403 (Eng.). 1769.

Action upon the case for a libel upon the plaintiff, in the words following:

"Old Villers, so strong of brimstone you smell,
As if not long since you had got out of hell;
But this damnable smell I no longer can bear,
Therefore I desire you would come no more here;
You old stinking, old nasty, old itchy old toad,
If you come any more, you shall pay for your board."

The defendant pleaded not guilty; and a verdict was found for the plaintiff and sixpence damages.

And now it was moved by Serjeant Burland, in arrest of judgment, that this was not such a libel for which an action would lie; that the itch is a distemper to which every family is liable; to have it is no crime, nor does it bring any disgrace upon a man, for it may be innocently caught or taken by infection; the smallpox, or a putrid fever, are much worse distempers; the itch is not so detestable or so contagious as either of them, for it is not communicated by the air, but by contact or putting on a glove, or the clothes of one who has the itch, and although it be an infectious distemper, yet it implies no offence in the person having it, and therefore no action will lie for saying or writing that a man has got the itch. It is not like saying or writing that a man has got the leprosy, or is a leper, for which an action upon the case will lie, because a leper shall be removed from the society of men by the writ of *de leproso amovendo,* 1 Roll. Abr. 44; Cro. Jac. 144; Hob. 219, although it be a natural infirmity.

BATHURST, J. I wish this matter was thoroughly gone into, and more solemnly determined; however, I have no doubt at present but that writing and publishing anything which renders a man ridiculous is actionable, and whether the itch be occasioned by a man's fault or misfortune, it is a cruel charge, and renders him both ridiculous and miserable, by being kept out of all company: I repeat it, that I wish there were some more solemn determination, that the writing and publishing anything which tends to make a man ridiculous or infamous ought to be punished; for saying a man has the itch, without more, perhaps an action would not lie without other malevolent circumstances. I am of the same opinion, that judgment must be for the plaintiff.

GOULD, J. What my brother Bathurst has said is very material; there is a distinction between libels and words; a libel is punishable both criminally and by action, when speaking the words would not be punishable in either way; for speaking the words rogue and rascal of any one, an action will not lie; but if those words were written and published of any one, I doubt not an action would lie. If one man should say of another that he has the itch, without more, an action

would not lie; but if he should write these words of another, and publish them maliciously, as in the present case, I have no doubt at all but the action well lies. What is the reason why saying a man has the leprosy or plague is actionable? It is because the having of either cuts a man off from society; so the writing and publishing maliciously that a man has the itch and stinks of brimstone, cuts him off from society. I think the publishing anything of a man that renders him ridiculous is a libel and actionable, and in the present case am of opinion for the plaintiff.

THORLEY v. LORD KERRY.

4 Taunt. 355 (Eng.). 1812.

This was an action for a libel contained in a letter addressed to Lord Kerry, the plaintiff below, and sent unsealed by one of his servants, who opened and read it. The letter charged Lord Kerry with being a hypocrite and using the cloak of religion for unworthy purposes. There was a plea of not guilty. A verdict was found for the plaintiff for £20 damages, and judgment was entered thereon without argument. The defendant sued out a writ of error to reverse this judgment.

MANSFIELD, C. J. * * * There is no doubt that this was a libel, for which the plaintiff in error might have been indicted and punished; because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule; for all words of that description an indictment lies; and I should have thought that the peace and good name of individuals was sufficiently guarded by the terror of this criminal proceeding in such cases. The words, if merely spoken, would not be of themselves sufficient to support an action.

But the question now is, whether an action will lie for these words so written, notwithstanding such an action would not lie for them if spoken; and I am very sorry it was not discussed in the Court of King's Bench, that we might have had the opinion of all the twelve judges on the point, whether there be any distinction as to the right of action between written and

parol scandal; for myself, after having heard it extremely well argued, and especially, in this case, by Mr. Barnewall, I cannot, upon principle, make any difference between words written and words spoken, as to the right which arises on them of bringing an action. For the plaintiff in error it has been truly urged, that in the old books and abridgments no distinction is taken between words written and spoken. But the distinction has been made between written and spoken slander as far back as Charles the Second's time, and the difference has been recognized by the courts for at least a century back. It does not appear to me that the rights of parties to a good character are insufficiently defended by the criminal remedies which the law gives, and the law gives a very ample field for retribution by action for words spoken in the cases of special damage, of words spoken of a man in his trade or profession, of a man in office, of a magistrate or officer; for all these an action lies. But for mere general abuse spoken, no action lies. In the arguments both of the judges and counsel, in almost all the cases in which the question has been, whether what is contained in a writing is the subject of an action or not, it has been considered whether the words, if spoken, would maintain an action. It is curious that they have also adverted to the question, whether it tends to produce a breach of the peace; but that is wholly irrelevant, and is no ground for recovering damages. So it has been argued that writing shows more deliberate malignity; but the same answer suffices, that the action is not maintainable upon the ground of the malignity, but for the damage sustained. So it is argued that written scandal is more generally diffused than words spoken, and is, therefore, actionable; but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter; it is true that a newspaper may be very generally read, but that is all casual. These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal.

But that distinction has been established by some of the greatest names known to the law, Lord Hardwicke, Hale, I believe Holt, C. J., and others. Lord Hardwicke, C. J., especially has laid it down that an action for a libel may be brought on words written, when the words, if spoken, would not sustain it.

Com. Dig. titl. Libel, referring to the case in Fitzg. 122, 253, says there is a distinction between written and spoken scandal; by his putting it down there as he does, as being the law, without making any query or doubt upon it, we are led to suppose that he was of the same opinion. I do not now recapitulate the cases, but we cannot, in opposition to them, venture to lay down at this day that no action can be maintained for any words written, for which an action could not be maintained if they were spoken; upon these grounds we think the judgment of the Court of King's Bench must be affirmed. The purpose of this action is to recover a compensation for some damage supposed to be sustained by the plaintiff by reason of the libel. The tendency of the libel to provoke a breach of the peace, or the degree of malignity which actuates the writer, has nothing to do with the question. If the matter were for the first time to be decided at this day, I should have no hesitation in saying that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken.

Judgment affirmed.

TRIGGS v. SUN PRINTING AND PUBLISHING ASSOCIATION.

86 N. Y. Supp. 486, 91 App. Div. 259, 179 N. Y. 144, 71 N. E. 739. 1904.

[Several articles appeared in the defendant's newspaper, making sport of the plaintiff, who was a professor of English in a Western University. The following extracts from one of the articles are typical of them all:

"We cannot boast of having discovered Triggs, for he was born great, discovered himself early, and has a just appreciation of the value of this discovery. But in our humble way we have helped communicate him to the world, assisted in his effusion and diffusion, and beckoned reverent millions to his shrine. We have joyed to see him perform three heroic labors, viz.:

"1. 'Knock out' old Whittier and Longfellow.

"2. 'Do up' the hymn writers.

"3. Name his baby at the end of a year of solemn consultation. But these achievements are only the bright beginning of a long

course of halcyon and vociferous proceedings. As yet, Prof. Triggs is but in the bud. He came near blossoming the other day, and the English drama would have blossomed with him. A firm which is to produce 'Romeo and Juliet' offered him $700 a week to be the 'advance agent' of the show and to 'work up enthusiasm by lecturing.' Prof. Triggs was compelled to decline the offer, but the terms of his refusal show that it is not absolute, and that 'some day,' as the melodramas cry, he will illuminate Shakespeare, dramatic literature, and the public mind. * * * If these plays are to be put upon the stage, they must be rewritten; and Prof. Triggs is the destined rewriter, amender, and reviser. The sapless, old-fashioned rhetoric must be cut down. The fresh and natural contemporary tongue, pure Triggsian, must be substituted. For example, who can read with patience these tinsel lines?

> Madam, an hour before the worshipped sun
> Peered forth the golden window of the east,
> A troubled mind drave me to walk abroad.

This must be translated into Triggsian something like this:

> Say, lady, an hour before sunup I was feeling
> Wormy, and took a walk around the block.

Here is more Shakespearian rubbish:

> O, she doth teach the torches to burn bright;
> Her beauty hangs upon the cheek of night,
> As a rich jewel in an Ethiop's ear.

How much more forcible in clear, concise Triggsian:

> Say, she's a peach! a bird!

Hear 'Pop Capulet' drivel:

> Go to, go to,
> You are a saucy boy.

In the Oscar dialect this is thus:

> Come off, kid! You're too fresh.

Compare the dropsical, hifalutin:

> Night's candles are burnt out, and jocund day
> Stands tiptoe on the misty mountain's tops.

with the time-saving Triggsian version:

> I hear the milkman."

The statements were admittedly false, but the defendant insisted that they were not libellous of the plaintiff as an individual or in his profession or occupation as an instructor. The articles, it was said, were not libellous "because they did not charge the plaintiff with having done anything which he had not a legal right to do," and were "merely criticisms of the ideas and theories of the plaintiff and of his literary composition." The plaintiff sued for libel, but did not allege special damage. The defendant demurred. The trial court overruled the demurrer, and the defendant appealed to the Appellate Division of the Supreme Court. Here the demurrer was sustained, and the plaintiff appealed to the Court of Appeals.]

MARTIN, J. This action was for libel. The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. By interposing a demurrer upon that ground, all the facts alleged in the complaint or which can by reasonable and fair intendment be implied from the allegations thereof, are deemed admitted. (Marie v. Garrison, 83 N. Y. 14; Sanders v. Souter, 126 N. Y. 193, 195; Ahrens v. Jones, 169 N. Y. 555, 559.)

A written or printed statement or article published of or concerning another which is false and tends to injure his reputation and thereby expose him to public hatred, contempt, scorn, obloquy or shame, is libellous per se. * * *

When the articles published by the defendant of and concerning the plaintiff are read in the light of the foregoing principles of law, it becomes obvious, we think, that they were libellous per se. It seems impossible for any fair-minded person to read the articles alleged in the complaint without reaching the conclusion that they were not only intended, but necessarily calculated, to injure the plaintiff's reputation and to expose him to public contempt, ridicule or shame.

It is contended by the respondent that the articles published were a mere comment or criticism of matters of public interest and concern, and, hence, were privileged. While everyone has a right to comment on matters of public interest, so long as one does so fairly, with an honest purpose, and not intemperately and maliciously, although the publication is made to the general public by means of a newspaper, yet, what is privileged is criticism, not other defamatory statements, and if a person takes upon himself to allege matters otherwise actionable, he will not be privileged, however honest his motives, if those allegations are not true. When a publisher goes beyond the limits of fair criticism, his language passes into the region of libel, and the question whether those limits have been transcended may become a question of law but ordinarily presents a question for the jury. (Fay v. Harrington, 176 Mass. 270.) It is true that an author when he places his work before the public invites criticism, and however hostile it may be, the critic is not liable for libel, provided he makes no misstatements of material facts contained in the writing and does not go out of his way to attack the author. The critic must, however, confine himself to criticism and not make it the veil for personal censure, nor allow himself to run into reckless and unfair attacks merely for the purpose of exercising his power of denunciation. If, under the pretext of criticising a literary production or the acts of one occupying a public position, the critic takes an opportunity to attack the author or occupant, he will be liable in an action for libel. (Cooper v. Stone, 24 Wend. 434; Mattice v. Wilcox, 71 Hun 484, 488, affirmed, 147 N. Y. 624; Hamilton v. Eno, 81 N. Y. 116.) Moreover, it is difficult to perceive how this privilege can be tried on demurrer, as the question whether the criticism was fair and just or willfully assailed the reputation of the plaintiff, would be for the jury. In this case it is obvious that the articles complained of go far beyond the field of fair and honest criticism, and are attempts to portray the plaintiff in a ridiculous light. As was in effect said by the learned judge in the dissenting opinion below: The articles complained of represent the plaintiff as illiterate, uncultivated, coarse and vulgar; and his ideas as sensational, absurd and foolish. They also represent him as egotistical and conceited in the extreme and convey the impression that he makes himself ridiculous both in his

method of instruction and by his public lectures. They also ridicule his private life by charging that he was unable to select a name for his baby until after a year of solemn deliberation. In short they effect to represent him as a presumptuous literary freak. These representations concerning his personal characteristics were not within the bounds of fair and honest criticism and are clearly libellous per se.

It is likewise claimed by the respondent that these articles were written in jest, and hence that it is not liable to the plaintiff for the injury he has sustained. It is perhaps possible that the defendant published the articles in question as a jest, yet they do not disclose that, but are a scathing denunciation, ridiculing the plaintiff. If, however, they can be regarded as having been published as a jest, then it should be said that, however desirable it may be that the readers of and the writers for the public prints shall be amused, it is manifest that neither such readers nor writers should be furnished such amusement at the expense of the reputation or business of another. In the language of Joy, C. B.: "The principle is clear that a person shall not be allowed to murder another's reputation in jest;" or, in the words of Smith, B., in the same case: "If a man in jest conveys a serious imputation, he jests at his peril." (Donoghue v. Hayes (1831), Hayes, Irish Exchequer, 265, 266.) We are of the opinion that one assaulting the reputation or business of another in a public newspaper cannot justify it upon the ground that it was a mere jest, unless it is perfectly manifest from the language employed that it could in no respect be regarded as an attack upon the reputation or business of the person to whom it related.

The single purpose of the rule permitting fair and honest criticism is that it promotes the public good, enables the people to discern right from wrong, encourages merit, and firmly condemns and exposes the charlatan and the cheat, and hence is based upon public policy. The distinction between criticism and defamation is that criticism deals only with such things as invite public attention or call for public comment, and does not follow a public man into his private life or pry into his domestic concerns. It never attacks the individual, but only his work. A true critic never indulges in personalities, but confines himself to the merits of the subject-matter, and never takes advan-

tage of the occasion to attain any other object beyond the fair discussion of matters of public interest and the judicious guidance of the public taste. The articles in question come far short of falling within the line of true criticism, but are clearly defamatory in character and are libellous per se.

It follows that the order of the Appellate Division and the interlocutory judgment entered thereon reversing the interlocutory judgment of the Special Term should be reversed, the judgment of the Special Term affirmed, with costs to the appellant in all the courts, and the question certified answered in the affirmative.

PARKER, CH. J., BARTLETT, VANN, CULLEN and WERNER, JJ., concur; O'BRIEN, J., absent.

Order reversed, etc.

PECK v. TRIBUNE CO.

214 U. S. 185. 1909.

MR. JUSTICE HOLMES delivered the opinion of the court:

This is an action on the case for a libel. The libel alleged is found in an advertisement printed in the defendant's newspaper, The Chicago Sunday Tribune, and, so far as is material, is as follows: "Nurse and Patients Praise Duffy's. Mrs. A. Schuman, One of Chicago's Most Capable and Experienced Nurses, Pays an Eloquent Tribute to the Great Invigorating, Life-Giving, and Curative Properties of Duffy's Pure Malt Whisky." Then followed a portrait of the plaintiff, with the words, "Mrs. A. Schuman," under it. Then, in quotation marks, "After years of constant use of your Pure Malt Whisky, both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it as the very best tonic and stimulant for all local and run-down conditions," etc., etc., with the words, "Mrs. A. Schuman, 1576 Mozart st., Chicago, Ill.," at the end, not in quotation marks, but conveying the notion of a signature, or at least that the words were hers. The declaration alleged that the plaintiff was not Mrs. Schuman, was not a nurse, and was a total abstainer from whisky and all spirituous liquors. There was also a count for publishing the plaintiff's likeness without leave. The defendant pleaded not guilty. At the trial, subject to exceptions, the judge excluded

the plaintiff's testimony in support of her allegations just stated, and directed a verdict for the defendant. His action was sustained by the circuit court of appeals, 83 C. C. A. 202, 154 Fed. 330.

Of course, the insertion of the plaintiff's picture in the place and with the concomitants that we have described imported that she was the nurse and made the statements set forth, as rightly was decided in Wandt v. Hearst's Chicago American, 129 Wis. 419, 421, 6 L. R. A. (N. S.) 919, 116 Am. St. Rep. 959, 109 N. W. 70, 9 A. & E. Ann. Cas. 864; Morrison v. Smith, 177 N. Y. 366, 69 N. E. 725. Therefore the publication was of and concerning the plaintiff, notwithstanding the presence of another fact, the name of the real signer of the certificate, if that was Mrs. Schuman, that was inconsistent, when all the facts were known, with the plaintiff's having signed or adopted it. Many might recognize the plaintiff's face without knowing her name, and those who did know it might be led to infer that she had sanctioned the publication under an alias. There was some suggestion that the defendant published the portrait by mistake, and without knowledge that it was the plaintiff's portrait, or was not what it purported to be. But the fact, if it was one, was no excuse. If the publication was libelous, the defendant took the risk. As was said of such matters by Lord Mansfield, "Whenever a man publishes, he publishes at his peril." R. v. Woodfall, Lofft, 776, 781. See further, Hearne v. Stowell, 12 Ad. & El. 719, 726; Shepheard v. Whitaker, L. R. 10 C. P. 502; Clarke v. North American Co., 203 Pa. 346, 351, 352, 53 Atl. 237. The reason is plain. A libel is harmful on its face. If a man sees fit to publish manifestly hurtful statements concerning an individual, without other justification than exists for an advertisement or a piece of news, the usual principles of tort will make him liable if the statements are false, or are true only of someone else. See Morasse v. Brochu, 151 Mass. 567, 575, 8 L. R. A. 524, 21 Am. St. Rep. 474, 25 N. E. 74.

The question, then, is whether the publication was a libel. It was held by the circuit court of appeals not to be, or, at most, to entitle the plaintiff only to nominal damages, no special damage being alleged. It was pointed out that there was no general consensus of opinion that to drink whisky is wrong, or that to be a nurse is discreditable. It might have been added

that very possibly giving a certificate and the use of one's portrait in aid of an advertisement would be regarded with irony, or a stronger feeling, only by a few. But it appears to us that such inquiries are beside the point. It may be that the action for libel is of little use, but, while it is maintained, it should be governed by the general principles of tort. If the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of majority vote.

We know of no decision in which this matter is discussed upon principle. But obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about or even known by all the world. No conduct is hated by all. That it will be by a large number, and will lead an appreciable fraction of that number to regard the plaintiff with contempt, is enough to do her practical harm. Thus if a doctor were represented as advertising, the fact that it would affect his standing with others of his profession might make the representation actionable, although advertising is not reputed dishonest, and even seems to be regarded by many with pride. See Martin v. The Picayune (Martin v. Nicholson Pub. Co.), 115 La. 979, 4 L. R. A. (N. S.) 861, 40 So. 376. It seems to us impossible to say that the obvious tendency of what is imputed to the plaintiff by this advertisement is not seriously to hurt her standing with a considerable and respectable class in the community. Therefore it was the plaintiff's right to prove her case and go to the jury, and the defendant would have got all that it could ask if it had been permitted to persuade them, if it could, to take a contrary view. Culmer v. Canby, 41 C. C. A. 302, 101 Fed. 195, 197; Twombly v. Monroe, 136 Mass. 464, 469. See Gates v. New York Recorder Co., 155 N. Y. 228, 49 N. E. 769.

It is unnecessary to consider the question whether the publication of the plaintiff's likeness was a tort per se. It is enough for the present case that the law should at least be prompt to recognize the injuries that may arise from an unauthorized use in connection with other facts, even if more subtilty is needed to state the wrong than is needed here. In this instance we feel no doubt.

Judgment reversed.

HULTON v. JONES.

1910, A. C. 20, 79 L. J., K. B. 198 (Eng.).

The action was brought by the respondent, Jones, for a libel which appeared in the "Sunday Chronicle," a newspaper of which the appellants were proprietors. It was contained in an article headed "Motor-Mad Dieppe, Brilliant Scene at French Seaside (From Our Paris Correspondent) Midnight Scenes, Music and Whiskey." The alleged libel was expressed in the following terms: "Up on the terrace marches the world, attracted by the motor races, a world immensely pleased with itself, and minded to draw a wealth of inspiration—and, incidentally, of golden cocktails—from any scheme to speed the passing hour. 'Whist! There is Artemus Jones with a woman who is not his wife, who must be—you know—the other thing!' whispers a fair neighbor of mine, excitedly, into her bosom friend's ear. 'Really; is it not surprising how certain of our fellow countrymen behave when they come abroad? Who would suppose by his goings on that he was a churchwarden at Peckham?' No one, indeed, would assume that Jones, in the atmosphere of London, could take on so austere a job as the duties of a churchwarden. Here in the atmosphere of Dieppe, on the French side of the Channel, he is the life and soul of a gay little band that haunts the Casino and turns night into day, besides betraying a most unholy delight in the society of female butterflies."

The respondent was a journalist who for some years had been a sub-editor and habitual contributor to the "Sunday Chronicle" and another of the appellants' newspapers, and his articles were signed "Artemus Jones" or "T. Artemus Jones," or "T. A. J." He was called to the Bar in 1902 and joined the North Wales Circuit. It was in evidence that he was not a churchwarden, did not live at Peckham, where he had only been once, that he was not a married man, that he complained of nothing except the use of the name "Artemus Jones." The Paris correspondent, Charles Dabarn, stated in evidence that he did not know and had never heard of the respondent, and that the name was suggested by the name "Artemus Ward" and was only intended to represent a type. He said also that

he had never seen any member of the appellant's staff. At the trial damages in the sum of £1,750 were awarded to the respondent.

THE LORD CHANCELLOR (LORD LOREBURN). I think this appeal must be dismissed. A question in regard to the law of libel has been raised which does not seem to me to be entitled to the support of your lordships. Libel is a tortious act. What does a tort consist in? It consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff. He has none the less imputed something disgraceful, and has none the less injured the plaintiff. A man in good faith may publish libel believing it to be true, and it may be found by the jury that he acted in good faith, believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under those circumstances he has no defence to the action.

It was suggested that there was a misdirection by the learned judge in this case. I see none. He laid down in his summing-up the law as follows: "The real point upon which your verdict must turn is: Ought or ought not sensible and reasonable people reading this article to think that there was a mere imaginary person such as I have said—Tom Jones, Mr. Pecksniff as a humbug, Mr. Stiggins, or any of that sort of names that one reads of in literature used as types? If you think any reasonable person would think that, it is not actionable at all. If, on the other hand, you do not think that, but think that people would suppose it to mean some real person—those who did not know the plaintiff of course would not know who the real person was, but those who did know of the existence of the plaintiff would think that it was the plaintiff—then the action is maintainable, subject to such damages as you think under the circumstances are fair and right to give the plaintiff." I see no objection in law to that passage. The damages are certainly heavy, but I think your Lordships ought to remember two things: The first is that the jury were entitled to think, in the absence of proof satisfactory to them—and they were the

judges of it—that some ingredient of recklessness entered into the publication and the writing of this article, especially as Mr. Jones, the plaintiff, had been employed on this very newspaper, and that his name was well known in the paper and also well known in the district in which the paper circulated. In the second place, the jury were entitled to say, This kind of article is the kind of article to be condemned. There is no tribunal more fitted or more competent to decide in regard to publications—especially publications in the newspaper press—whether they bear a stamp and character which ought to enlist sympathy and to secure protection. If they think that the license is not fairly used, and that the tone and style of the article and the libel in question is one that is reprehensible and ought to be checked, it is for the jury to say so; and for my part, although I think the damages are certainly high in this case, I am not prepared to advise your Lordships to interfere, especially as the Court of Appeal has not thought it right to interfere, with the verdict which is now seeking confirmation.

MUNDEN v. HARRIS.

134 S. W. 1076 (Kan.). 1911.

[The defendant, a jeweler, had caused the publication of the following advertisement, containing a picture of the plaintiff, a boy about five years old; the publication was without the consent of the plaintiff or any one legally acting for him:

[Picture of Plaintiff.]

"Papa is going to buy mamma an Elgin watch for a present, and some one (I mustn't tell who) is going to buy my big sister a diamond ring. So don't you think you ought to buy me something? The payments are so easy, you'll never miss the money if you get it of

Harris-Goar Co.,
1207 Grand Ave.,
Kansas City Mo.

Gifts for Everybody, Everywhere in their Free Catalogue."

In an action by the infant for libel the defendant demurred to the petition, on the ground that there was nothing defamatory in such a publication. The circuit court sustained the demurrer, and the plaintiff appealed to the Kansas City Court of Appeals.]

ELLISON, J. * * * Our statute (section 4818, Rev. St. 1909) declares a libel upon a person to be a thing "made public by any printing, writing, sign, picture, representation or effigy tending to provoke him to wrath, or expose him to public hatred, contempt or ridicule. * * *" The printed matter set forth in the petition is the utterance of falsehoods, of a character tending to incite ridicule.

It was argued that the printed matter published consisted of purported utterances of plaintiff, which were falsehoods, and that to charge one in writing with being a falsifier was libelous per se. We are not inclined to base our decision on that ground, since we believe the statement purporting to have been made by plaintiff was palpably not intended to be understood, and would not be taken to be a false statement of fact, but rather as an imaginary statement attributed to him by defendants for purposes of advertisement of their goods. But it seems to us clear that, considering the publication of the picture and the printed matter as a whole, it would expose plaintiff to ridicule and contempt, unless his age (to which we will presently refer) would exempt him. It is a public statement of what plaintiff had said about the private affairs of his father in relation to a present for his mother, and is a reference to the private social affairs of his sister. Connecting these statements with his picture and using them as an advertising aid to business was necessarily bound to cause him to undergo the vexation and humiliation of ridicule, though it was not believed he had really made the statements. It does not require any imagination to realize what a suggestive handle it would give to the teasing propensities of his fellows, to be used by them without stint and without regard to his distress. * * *

Though, as thus shown, a child of tender years be incapable of uttering a slander or publishing a libel, it does not follow that he may not be slandered or libeled. The two positions are not dependable upon one another. In some instances and in some stages of infancy, opprobrium could not affect a child. Much would depend upon the nature of the offensive imputation. If an infant at the breast of his mother was charged with being a thief, it probably would not be slander, since it is not possible for him to commit larceny, either in point of fact or point of law. But if such infant should be charged with being

afflicted with a loathsome and permanent disease, or with a private and humiliating physical malformation, these are charges which could be true, and, furthermore, they are species of defamation which would grow and the harmful effect of which would increase with the passing of time, and we can see no reason why it would not be slander. It has been decided that the fact that an infant is too young for criminal responsibility will not bar him of his action against his traducer. Stewart v. Howe, 17 Ill. 71. By the statute of Illinois the common-law, criminal irresponsibility for crime was raised from seven to ten years in cases of larceny, and a girl, of age between nine and ten, was charged with being "a smart little thief." The defendant sought to escape liability on the ground that she could not commit the crime of theft. The judge delivering the opinion became heated and indignant, and characterized the defendant as a "reputational infanticide," and said that he "would sooner see the action abolished than to read out infancy from the pale of its protection."

The foregoing is sufficient for an understanding of our views in relation to plaintiff's liability to be wronged, or, if it may be so expressed, his capacity to be injured. In our opinion, notwithstanding he was but five years old, he was liable to the ridicule of his fellows. His susceptibility to vexation and humiliation was at hand, and his appreciation of the outrage committed by defendants would grow in greater proportion than would the failure of memory in his associates.

It is well enough to add that a trial may disclose that plaintiff was less than five years old; and so much less as not to be the subject of ridicule or contempt, or public hatred, by any appreciable number of the community (Peck v. Tribune Co., supra). If so, then, under the views we have expressed, he was not libeled. It may be that his years and his intelligence were such that to be a subject of ridicule, contempt, or hatred would be a matter over which persons would differ, in which event the question could not be withdrawn from a jury, but would be for their consideration as to the law and the fact, as is proper in libel.

The result of the foregoing consideration is to reverse the judgment and remand the cause for trial. All concur.

CHAPTER IV.

THE PLAINTIFF'S CASE IN DEFAMATION.

What Constitutes Publication.

SNYDER v. ANDREWS.

6 Barb. 43 (N. Y.). 1849.

In an action for a libel contained in a letter written and addressed by the plaintiff to the defendant, the defendant admitted that he wrote the letter containing the alleged libel, sealed the same, and put it into the post office at Saratoga Springs, directed to the plaintiff, at his residence. The plaintiff proved by John R. Brown, that the letter was read to the witness by the defendant, at his office, in the presence of a young man who was a clerk of the defendant. The defendant's counsel then moved for a nonsuit, on the ground that a publication of the libel had not been proved. The judge denied the motion. The jury found a verdict for the plaintiff of $250. And the defendant, upon a bill of exceptions, moved for a new trial.

WILLARD, J. The fact that the defendant read the letter to a stranger, before it was sent to the plaintiff, was not questioned on the trial, and is assumed to be true, by the form of the objection; but it is insisted, that such reading did not amount to a publication of the libel. No man incurs any civil responsibility for what he thinks, or even writes, unless he divulges his thoughts, to the temporal prejudice of another. Hence, a sealed letter, containing libelous matter, if communicated to no one but the party libeled, is not the foundation for a civil action, although it may be of an indictment. (Lyle v. Clason, 1 Caines, 581; Hodges v. The State, 5 Humphrey, 112; 1 Wm. Saund. 132, n. 2; Philips v. Jansen, 2 Esp. C. 626; 2 Starkie on Slander, Wend. ed. 14.) But where the defendant, knowing that letters addressed to the plaintiff were usually opened by and read by his clerk, wrote a libelous letter, and

directed it to the plaintiff, and his clerk received and read it, it was held that there was a sufficient publication to support the action. (Delacroix v. Thevenot, 2 Stark. Cases, 471.) And in Schenck v. Schenck (1 Spencer, 208), a sealed letter addressed and delivered to the wife, containing a libel on her husband, was held a publication sufficient to enable the latter to sustain an action. Reading or signing the contents of a libel in the presence of others, has been adjudged a publication. (2 Starkie on Slander, 16; 5 Rep. 125; 9 Id. 59, b; 1 Saund. 132, n. 2.) The reading of the letter in question, by the defendant, in the presence of Brown, was a sufficient publication to sustain this action.

New trial denied.

SHEFFILL v. VAN DEUSEN.

13 Gray, 304 (Mass.). 1859.

Action of tort for slander. Trial in the court of common pleas, before Briggs, J., who signed this bill of exceptions:

"The words claimed to have been slanderous were spoken, if at all, at the dwelling house of the defendants, and in that part thereof called the bakery, where bread and other articles were sold to customers; and were spoken by Mrs. Van Deusen to Mrs. Sheffill. The defendants asked the court to instruct the jury that if the words alleged in the plaintiff's declaration were spoken to Mrs. Sheffill, and no other person but Mrs. Sheffill and Mrs. Van Deusen were present, there was no such publication of the words as would maintain the action. The court declined so to instruct, but did instruct the jury that if the words were publicly uttered in the bakery of the defendants, there was a sufficient publication, though the plaintiff has not shown that any other person was present, at the time when they were spoken, but Mrs. Sheffill and Mrs. Van Deusen.

"The jury returned a verdict for the plaintiffs, and the defendants except."

BIGELOW, J. Proof of the publication of the defamatory words alleged in the declaration was essential to the maintenance of this action. Slander consists in uttering words to the injury of a person's reputation. No such injury is done when the

words are uttered only to the person concerning whom they are spoken, no one else being present or within hearing. (It is damage done to character in the opinion of other men, and not in a party's self-estimation, which constitutes the material element in an action for verbal slander.) Even in a civil action for libel, evidence that the defendant wrote and sent a sealed letter to the plaintiff, containing defamatory matter, was held insufficient proof of publication; although it would be otherwise in an indictment for libel, because such writings tend directly to a breach of the peace. So too it must be shown that the words were spoken in the presence of some one who understood them. If spoken in a foreign language, which no one present understood, no action would lie therefor. Edwards v. Wooton, 12 Co. 35; Hickes's case, Pop. 139, and Hob. 215; Wheeler & Appleton's case, Gobd. 340; Phillips v. Jansen, 2 Esp. R. 624; Lyle v. Clason, 1 Caines, 581, Hammond N. P. 287.

It is quite immaterial, in the present case, that the words were spoken in a public place. The real question for the jury was, were they so spoken as to have been heard by third persons? The defendants were therefore entitled to the instructions for which they asked.

Exceptions sustained.

Whether Intent to Defame Is Necessary.

SHEPHEARD v. WHITAKER.

L. R. 10 C. P. 502 (Eng.). 1875.

The declaration stated that the defendant falsely and maliciously printed and published in a certain newspaper called "The Bookseller," the words following, that is to say: "The Gazette. First Meeting under the new Bankruptcy Act. Shepheard, Shepheard, and Yeomans, Garrick Street and Cheapside, under the firm of British and Foreign Stationery Company, stationers, printers, and booksellers, as regards Charles Yeomans,"—the defendant meaning thereby that the plaintiff's firm had been bankrupt, or had taken proceedings in liquidation or for composition, and that a first meeting of creditors under their bankruptcy or proceedings in liquidation or for composition was about to be held. Plea, not guilty. Issue thereon. At the trial

before Grove, J., it appeared that, through the negligence of the persons in the defendant's employ, instead of announcing in the extracts from the "London Gazette" inserted in their newspaper called "The Bookseller," published on the 1st of January, 1875, that there had been a dissolution of the partnership of the firm, the advertisement announcing it was inserted amongst the first meetings under the Bankruptcy Act.

Upon the discovery of the mistake, the defendant, whose publication only appeared monthly, printed and circulated amongst the trade 4000 copies of the Booksellers' Circular explaining the blunder, and inserted an ample apology in his next issue, on the 1st of February, and also in the Stationers' Circular of the 5th.

The learned judge left it to the jury to say whether or not the publication was libelous, telling them that at all events it was not a case for serious damages.

The jury returned a verdict for the plaintiff, damages £50.

LORD COLERIDGE, C. J. I am of opinion that there should be no rule. To entitle the defendant to complain of the declaration, he must shew that the words cannot possibly bear the sense imputed to them in the innuendo. I think the result suggested by it might and probably would follow from such a publication. A person reading the announcement might well suppose that the parties referred to had been bankrupt. With regard to the damages, I see no ground for saying that they are at all excessive or unreasonable.

CHAPTER V.

THE DEFENDANT'S RESPONSE TO A CHARGE OF DEFAMATION.

Privilege as a Defense.

SCOTT v. STANSFIELD.

L. R. 3 Exch. 220 (Eng.). 1868.

In an action for slander the case was this. The plaintiff's declaration alleged that he was an accountant and scrivener, that the defendant had falsely spoken and published of the plaintiff, and in relation to his business, these words: "You are a harpy, preying on the vitals of the poor." The defendant pleaded that he was a County Court judge, that the words complained of were spoken by him in his capacity as such judge, while sitting at his court and trying a case in which the present plaintiff was defendant. To this the plaintiff replied that the words were spoken maliciously, without any foundation whatever, and not bona fide in defendant's discharge of his duty as judge, and that they were wholly uncalled for, immaterial, irrelevant, and impertinent to the matter before the defendant and were wholly unwarranted on said occasion. The defendant demurred to this and thereby admitted, for the purpose of the question before the court, the facts alleged by the plaintiff.

MARTIN, B. It seems to me quite clear that words spoken under the circumstances stated in these pleadings are not the subject of an action of slander. The plea states that the defendant, at the time when he spoke the words complained of, was sitting as the judge of a court of record, and spoke them while acting in his capacity of judge, and trying a cause within his jurisdiction in which the present plaintiff was defendant. If words spoken under such circumstances were the subject of an action of slander, the most mischievous consequences would ensue; no judge, as my Lord has pointed out, would

able freely to administer justice, for if it were alleged, as is the case here, that he spoke falsely and maliciously and not bona fide in the discharge of his duty, and that what he said was irrelevant to the matter in hand, a jury would have to determine the question whether what he said in the course of a case which he had jurisdiction to try was or was not said under the circumstances so alleged. What judge could try a case with any degree of independence if he was to be afterwards subject to have his conduct in the administration of justice commented upon to a jury, and the propriety of it determined by them? It appears to me that the opinion expressed by Chief Justice Kent, in the American case cited, puts this matter upon its proper foundation, and states that which is both sound law and good sense in reference to it. I do not think we are really deciding anything new, for to my mind the decisions of the Court of Queen's Bench have gone the full length of our present decision.

TREBBY v. TRANSCRIPT PUB. CO.

76 N. W. 961 (Minn.). 1898.

Trebby sued the Transcript Publishing Company for libel. The trial resulted in a verdict for the defendant. The plaintiff appealed from an order denying his motion for a new trial.

MITCHELL, J. * * * The facts leading up to the publication of the alleged libel were as follows: The city of Little Falls has issued to a waterpower company its bonds to the amount of $25,000 in aid of the improvement of the waterpower of the Mississippi River at this place, whereupon the plaintiff brought an action to restrain the city treasurer from paying the bonds, and to compel the waterpower company to return them, on the ground that they were illegally issued and void. To the complaint in this action the waterpower company demurred on the ground that it did not state a cause of action. The demurrer was overruled, and from the order overruling it the waterpower company appealed to this court. The bonds having been subsequently surrendered and cancelled under some new agreement between the city and the waterpower company,

this appeal was not prosecuted further, and was finally dismissed by this court for want of prosecution, and judgment for costs rendered against the waterpower company. Thereupon the plaintiff caused to be published in a St. Paul paper an article to the effect that the judgment of this court in relation to the bonds was in favor of the plaintiff; that the amount in controversy was $25,000; that this decision rendered the bonds void; that the case had been in contest for some time, and was quite important. This article having come to the notice of some bankers and brokers in Chicago, they wrote to the mayor of the city, asking for the particulars, and inquiring if the city had started on an era of repudiation, and why the bonds were contested. Thereupon some of the citizens of Little Falls presented a petition to the city council, reciting the facts, and stating that they deemed the city had been slandered by the publication of the article, and that action should be taken "to make the truth public, so that the good name of the city should be continued." Thereupon the city council passed a resolution set out in the complaint, in which they characterized the plaintiff as a "disreputable person," and recited that the facts were falsely reported by him to the St. Paul paper with full knowledge of the true facts, and that he maliciously and intentionally made a false report, and condemned his conduct as execrable and odious, and having caused the city irreparable damage. This resolution, preceded by an historical introduction, and headed "The City's Credit" (also set out in the complaint), the defendant published in its newspaper published in the city of Little Falls, and circulated in that city and the surrounding country. This is the publication complained of.

1. We shall spend no time on the question whether this publication was libellous on its face. It was clearly calculated to injure plaintiff in the good opinion and respect of others, and expose him to the contempt and hatred of his neighbors, especially in the city of Little Falls. It was manifestly libellous unless privileged.

2. Defendant contends that the publication was absolutely privileged, because its paper was the official newspaper of the city, and the city charter (Sp. Laws 1889, c. 8, 52) required all ordinances and resolutions to be published in the official newspaper before they shall be in force. To this there are several

answers: First, the provision of the charter invoked does not seem to apply to resolutions of this character, but merely to ordinances which will have some operative force after they are passed; second, this does not purport to be an official publication, but merely the publication of an item of news; and, third, the resolution was not within the scope of the duty of the city council, but wholly outside of it, and privilege can only be claimed of things published within the scope of official authority. The city council had no more authority to libel or traduce the private character of a private citizen than an assemblage of private citizens would have. Buckstaff v. Hicks, 94 Wis. 34, 38 N. W. 403; Wilcox v. Moore, 69 Minn., 71 N. W. 917. Neither was the publication privileged conditionally. A privileged communication is made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to a duty which he has, or honestly believes he has, a duty to a person having a corresponding interest or duty, and which contains matter, which, without the occasion upon which it is made, would be defamatory and actionable. Newall, Defam. 388. If the article published by the plaintiff in the St. Paul paper was calculated to unjustly impair the credit of the city, the city council or the defendant would have a perfect right to publish the actual facts, in order to set the city's credit right before the public, although such facts might reflect on the conduct of the plaintiff, but not to make false and defamatory statements regarding plaintiff's character. Landon v. Watkins, 61 Minn. 137, 63 N. W. 615. It is true that the publication complained of was, as a matter of news, entirely true; that is, the city council did pass the resolution just as stated by the defendant.

But the publication in a newspaper of false and defamatory matter is not privileged because made in good faith as a matter of news. The right to publish through the newspaper press such matters of interest as may be thus properly laid before the public does not go to the extent of allowing the publication concerning a person of false and defamatory matter, there being no other reason or justification for doing so than merely the purpose of publishing news. Mallory v. Pioneer Press Co., 34 Minn. 521, 26 N. W. 904. The article was not privileged, either absolutely or conditionally.

CHILD v. AFFLECK.

9 Barn & Cress. 403 (Eng.). 1829.

Case for a libel. Plea, the general issue. At the trial before Lord Tenterden, Ch. J. at the Westminster sittings after Hilary Term, it appeared in evidence that the plaintiff had been in the service of the defendants, Mrs. Affleck having before she hired her made inquiries of two persons, who gave her a good character. The plaintiff remained in that service a few months, and was afterwards hired by another person, who wrote to Mrs. Affleck for her character; and received the following answer, which was the alleged libel: "Mrs. A's compliments to Mrs. S., and is sorry that in reply to her inquiries respecting E. Child, nothing can be in justice said in her favour. She lived with Mrs. A. but for a few weeks, in which short time she frequently conducted herself disgracefully; and Mrs. A. is concerned to add she has, since her dismissal, been credibly informed she has been and now is a prostitute in Bury." In consequence of this letter the plaintiff was dismissed from her situation. It further appeared that after that letter was written, Mrs. Affleck went to the persons who had recommended the plaintiff to her, and made a similar statement to them. Upon this evidence it was contended, for the defendants, that there was no proof of malice, and that consequently the plaintiff must be nonsuited. On the other hand, it was urged that Mrs. Affleck's statement of what the plaintiff's conduct had been after she left her service was not privileged, and that, at all events, that part of the letter and the statement that she voluntarily made to other persons, and not in answer to any inquiries, were evidence of malice. Lord Tenterden, Ch. J., was of the opinion that the latter part of the letter was privileged, and that the other communication being made to persons who had recommended the plaintiff were not evidence of malice, and he directed a nonsuit.

PARKE, J. The rule laid down by Lord Mansfield in Edmonson v. Stevenson has been followed ever since. It is, that in an action for defamation in giving a character of a servant, "the gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved." The question then is, whether the plaintiff in this case adduced evidence,

which, if laid before a jury, could probably lead them to find express malice. That does not appear upon the face of the letter. *Prima facie* it is fair, and undoubtedly a person asked as to the character of a servant may communicate all that is stated in that letter. Independently of the letter, there was no evidence except of the two persons that had recommended the plaintiff. The communication to them, therefore, was not officious, and Mrs. Affleck was justified in making it. In Rogers v. Clifton, evidence of the good conduct of the servant was given, and the communication also appeared to be officious. In Blackburn v. Blackburn, the occasion of writing the alleged libel did not distinctly appear, it was therefore properly left to the jury to say, whether it was confidential and privileged or not, and they found that it was not. Here the letter was undoubtedly *prima facie* privileged, the plaintiff, therefore, was bound to prove express malice in order to take away the privilege.

TODD v. HAWKINS.

8 Car. & P. 888 (Eng.). 1837.

Todd brought an action for libel against Hawkins. It appeared that Todd was paying his addresses to the defendant's mother-in-law, who was a widow, when the defendant wrote her a letter containing imputations on Todd's character, referring to him as "an unprincipled trickster," and urging that she make diligent and extensive inquiry, and seek divine aid in order to be delivered "from the fatal snare."

ALDERSON, B. The question you will have to determine is, whether, the writing of this letter being justified by the circumstances under which it was written, there is anything to show that the defendant was actuated by malice. In many cases malice is to be inferred from the writing itself; ordinarily the law infers that anyone who without a justifiable occasion writes that which is prejudicial to the character of another, is actuated by malicious motives. Where, however, there is a justifiable occasion for the communication, the law very properly draws a different line. Here is a widow about to contract marriage with the plaintiff; the defendant is her son-in-law; I think, therefore, that he was justified in writing this letter to her, provided you are satisfied that in doing so he acted bona

fide, although the imputations contained in the letter be false, or based upon the most erroneous information. There is no doubt, that unless this letter was justified by the occasion, it is a libel, and had Mrs. Taft and the defendant been strangers to each other this would have been a mere question of damages. However, in this case, although the letter be derogatory to the plaintiff's character, and written in a stronger language than a prudent man would use, you must consider whether it was written sincerely, and with a desire to benefit the person to whom it was addressed. The letter professes to be so, and you must decide whether that profession is made bona fide. The request that this lady would make diligent and extensive inquiry into the character of Mr. Todd was extremely good advice, and so is the exhortation to her to apply herself to prayer. It may not be judicious on trifling or light occasions to make reference to sacred things; but on an important occasion like that which calls forth this letter, no better advice could be given. The question you have to try is, not whether Mr. Todd was guilty of the charges laid against him, but whether, although the defendant may have acted rashly, he wrote the letter bona fide. So far as pecuniary interests are concerned, it would be to the advantage of the defendant that this lady should marry, and that tends to show bona fides, as men do not in general act maliciously and at the same time against their own interests. The whole of the circumstances are before you, and the occasion is one which prima facie justifies the letter. If, however, the defendant has availed himself of the occasion for malicious purposes, he must answer for what he has done. If, on the other hand, he has used expressions, however harsh, hasty, or untrue, yet bona fide, and believing them to be true, he was justified in so doing. It is for the good of all that communications of this kind should be viewed liberally by juries; and unless you see clearly that this letter was written with a malicious intention of defaming the plaintiff, your verdict ought to be for the defendant. Verdict for the defendant.

ALDERSON, B. I hope it will be understood that this verdict is founded on the fact that this letter was a confidential communication.

The Foreman of the Jury: My Lord, that is so.

THE COUNT JOANNES v. BENNETT.

5 Allen 169 (Mass.). 1862.

Tort is the name of "The Count Joannes (born George Jones)" for two libels upon him contained in letters to a woman to whom he was then a suitor, and was afterwards married, endeavoring to dissuade her from entering into the marriage.

At the trial in this court, before Merrick, J., it appeared that the defendant had for several years held the relation of pastor to the parents of the woman, as members of his church, and to the daughter, as a member of his choir; and there was evidence tending to show that he was on the most intimate terms of friendship with the parents, and that, on the 18th of May, 1860, being then on a visit from his present residence in Lockport, New York, he called upon the father at his place of business in Boston, and was urged by him to accompany him to his residence in South Boston, the father stating that both he and his wife were in great distress of mind and anxiety about their daughter, and that they feared she would engage herself in marriage to the plaintiff. On their way to South Boston, the father stated to the defendant what he and his wife had heard and apprehended about the plaintiff, and their views with regard to his being an unsuitable match for their daughter, who, with a young child by a former husband, was living with them.

On reaching the house, it was found that the daughter had gone out; and it was then arranged that the defendant should write a letter, and materials for that purpose were furnished, and the letter set forth in the first count was written, addressed to the daughter, and left open and unsealed with the mother, after the principal portion of it had been read aloud at the teatable in the presence of the parents and a confidential friend of the family. On leaving, the defendant was further requested to do what he thought best to induce the daughter to break up the match.

* * * * * * * * *

BIGELOW, C. J. The doctrine, that the cause or occasion of a publication of defamatory matter may afford a sufficient justification in an action for damages, has been stated in the form of a legal rule or canon, which has been sanctioned by high judi-

cial authority. The statement is this: A communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty to perform, is privileged, if made to a person having a corresponding interest or duty, although it contains defamatory matter, which without such privilege would be libellous and actionable. It would be difficult to state the result of judicial decisions on this subject, and of the priniciples on which they rest, in a more concise, accurate and intelligible form. Harrison v. Bush, 5 El. & Bl. 344, 348; Gassett v. Gilbert, 6 Gray, 94, and cases cited.

It seems to us very clear that the defendant in the present case fails to show any facts or circumstances in his own relation to the parties, or in the motives or inducements by which he was led to write the letter set out in the first count of the declaration, which bring the publication within the first branch of this rule. He certainly had no interest of his own to serve or protect in making a communication concerning the character, occupation and conduct of the plaintiff, containing defamatory or libellous matter. It does not appear that the proposed marriage which the letter written by the defendant was intended to discountenance and prevent, could in any way interfere with or disturb his personal and social relations. It did not even involve any sacrifice of his feelings or injury to his affections.

The person to whom the letter was addressed was not connected with him by the ties of consanguinity or kindred. It is not shown that he had any peculiar interest in her welfare. Under such circumstances, without indicating the state of facts which might afford a justification for the use of defamatory words, it is plain that the defendant held no such relation towards the parties as to give him any interest in the subject matter to which his communication concerning the plaintiff related. Todd v. Hawkins, 2 M. & Rob. 20 S. C. 8 C. & P. 88. No doubt, he acted from laudable motives in writing it. But these do not of themselves afford a legal justification for holding up the character of a person to contempt and ridicule. Good intentions do not furnish a valid excuse for violating another's rights, or give impunity to those who cast unjust imputations on private character.

It is equally clear that the defendant did not write and publish the alleged libellous communications in the exercise of any legal or moral duty. He stood in no such relation towards the parties as to confer on him a right or impose on him an obligation to write a letter containing calumnious statements concerning the plaintiff's character.

Whatever may be the rule which would have been applicable under similar circumstances while he retained his relation of religious teacher and pastor towards the person to whom this letter in question was addressed, and towards her parents, he certainly had no duty resting upon him after that relation had terminated. He then stood in no other attitude towards the parties than as a friend. His duty to render them a service was no greater or more obligatory than was his duty to refrain from uttering and publishing slanderous or libellous statements concerning another. It is obvious that if such communications could be protected merely on the ground that the party making them held friendly relations with those to whom they were written or spoken, a wide door would be left open by which indiscriminate aspersion of private character could escape with impunity. Indeed, it would rarely be difficult for a party to shelter himself from the consequences of uttering or publishing a slander or libel under a privilege which could be readily made to embrace almost every species of communication. The law does not tolerate any such license of speech or pen.

The duty of avoiding the use of defamatory words cannot be set aside except when it is essential to the protection of some substantial private interest, or to the discharge of some other paramount and urgent duty. It seems to us, therefore, that on the question of justification set up by the defendant under a supposed privilege which authorized him to write the letter set out in the first count, the instructions of the court were correct.

* * * * * * * * *

In the case at bar, the plaintiff offered no evidence to show the circumstances under which he destroyed the letter referred to in his second count. He was not, therefore, entitled to offer any proof to show the contents. On this ground the verdict is set aside, and a new trial granted.

Fair Comment as a Defense.

SIR JOHN CARR, KNIGHT v. HOOD.

1 Camp. 355 (Eng.). 1808.

The plaintiff, Sir John Carr, was the author of three books of travel, published in 4to. and entitled respectively, "The Stranger in France," "A Northern Summer," and "The Stranger in Ireland." After these books had appeared, the defendant published a book entitled "My Pocket Book, or Hints for a Ryghte Merrie and Conceited Tour, in 4to., to be called The Stranger in Ireland in 1805, by a Knight Errant." Sir John was of the opinion that this work defamed him, and therefore sued its publisher in libel. The declaration alleged among other things, that this publication contained a "defamatory print, of and concerning the said Sir John, and of and concerning the said books of the said Sir John, 1st and 2ndly above mentioned, therein called, Frontispiece, and entitled 'The Knight (meaning the said Sir John) leaving Ireland with Regret,' and containing and representing in the said print, a certain false, scandalous, and malicious, defamatory, and ridiculous representation of the said Sir John, in the form of a man of ludicrous and ridiculous appearance, holding a pocket-handkerchief to his face, and appearing to be weeping, and also containing therein, a certain false, malicious, and ridiculous representation of a man of ludicrous and ridiculous appearance, following the representation of the said Sir John, and representing a man loaded with, and bending under the weight of three large books, one of them having the word 'Baltic,' printed on the back thereof, &c., and a pocket-handkerchief appearing to be held in one of the hands of the said representation of a man, and the corners thereof appearing to be held or tied together, as if containing something therein, with the printed words 'wardrobe' depending therefrom, (thereby falsely, scandalously, and maliciously meaning and intending to represent, for the purpose of rendering the said Sir John ridiculous, and exposing him to laughter, ridicule and contempt, that one copy of the said 1st mentioned book of the said Sir John, and two copies of the said book of the said Sir John 2ndly above mentioned, were so heavy as to cause a man to bend under the weight thereof, and that his the said Sir

John's wardrobe was very small, and capable of being contained in a pocket-handkerchief), and which said libel also contained, &c., &c. The declaration concluded by laying as special damage, that the said Sir John had been prevented and hindered from selling to Sir Richard Philips Knt. for a large sum of money, to-wit, £600, the copyright of a certain book or work of him the said Sir John, of which the said Sir John was the author, containing an account of a tour of him the said Sir John through part of Scotland, which but for the publishing of the said false, scandalous, malicious, and defamatory libels, he the said Sir John would, could, and might have sold to the said Sir Richard Philips for the said last mentioned sum of money, and the same remained wholly unsold and undisposed of, and was greatly depreciated and lessened in value to the said Sir John." Plea, not guilty.

LORD ELLENBOROUGH said: Every man who publishes a book commits himself to the judgment of the public, and anyone may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. In the present case, had the party writing the criticism followed the plaintiff into domestic life for the purpose of slander, that would have been libellous; but no passage of this sort has been produced, and even the caricature does not affect the plaintiff, except as the author of a book which is ridiculed. The works of this gentleman may be, for aught I know, very valuable; but whatever their merits, others have a right to pass their judgment on them,—to censure them if they be censurable, and to turn them into ridicule if they be ridiculous. The critic does a great service to the public, who writes down any vapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and money upon trash. I speak of fair and candid criticism; and this everyone has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider an injury; because it is a loss which the party ought to sustain. It is, in short, the loss of fame and profits to which he was never entitled. Nothing can be conceived more threatening to the liberty of the press than the

species of action before the court. We ought to resist an attempt against free and liberal criticism at the threshold. The Chief Justice concluded by directing the jury, that if the writer of the publication complained of had not traveled out of the work he criticised for the purpose of slander, the action would not lie; but if they could discover in it anything personally slanderous against the plaintiff, unconnected with the works he had given to the public, in that case he had a good cause of action, and they would award him damages accordingly.

Verdict for the defendants.

CAMPBELL v. SPOTTISWOODE.

3 B. & S. 769 (Eng.). 1863.

The Rev. Dr. Campbell, editor and part proprietor of a religious newspaper called "The British Ensign," brought an action of libel against the proprietor of "The Saturday Review" for an article in that journal commenting on a proposal and certain letters in "The Ensign." The proposal was to publish in "The Ensign" a series of letters to the Queen and persons of note on the subject and duty of evangelizing the Chinese, and to promote as widely as possible the circulation of the numbers of the paper in which these letters should appear, in order to call the attention of missionaries and others to the importance of this work of evangelization. A series of letters accordingly appeared in "The British Ensign," the three first of which, headed "Christian Missions," were addressed to the Queen, and the rest headed "China—Conversion of the Chinese," were addressed to the Archbishop of Canterbury, the Earl of Shaftsbury, and other persons; and from time to time in the same numbers with the letters were published lists of subscribers for copies of the paper for distribution. In one of these lists were the following, "The Hon. Mrs. Thompson, 5,000 copies; An Old Soldier, 100; R. G., 240."

Upon this proposal and the letters the article in "The Saturday Review" commented as follows: "To spread the knowledge of the gospel in China would be a good and an excellent thing, and worthy of all praise and encouragement; but to make such a work a mere pretext for puffing an obscure newspaper

into circulation is a most scandalous and flagitious act; and it is this act, we fear, we must charge against Dr. Campbell." * * * "There have been many dodges tried to make a losing paper 'go,' but it remained for a leader in the Nonconformist body to represent the weekly subscription as an act of religious duty. Moreover, the well-known device is resorted to of publishing lists of subscribers, the authenticity of which the public have, to say the least, no means of checking—'R. G.' takes 240 copies, 'A London Minister' 120, 'An Old Soldier' 100, and so on. Few readers, we imagine, will have any doubt in their minds as to who is the 'Old Soldier.'" * * * "Whatever may be the private views of the editor of 'The Ensign,' there can be no question that his followers are sincere enough in the confidence they repose in his plan. It must be a very happy thing to be gifted with so large a stock of faith. It must take the sting out of many a sorrow, and smooth away many a trouble. The past cannot be very sad or the future very dreadful to him who has the capacity for hoping all things and believing all things without hesitation. If this temper of mind should lay its possessor open occasionally to the beguilements of an impostor, more than an equivalent is provided in its freedom from doubts and suspicions, and the sense of security that it confers." * * * "No doubt it is deplorable to find an ignorant credulity manifested among a class of the community entitled on many grounds to respect; but now and then this very credulity may be turned to good account. Dr. Campbell is just now making use of it for a very practical purpose, and tomorrow some other religious speculator will cry his wares in the name of Heaven, and the mob will hasten to deck him out in purple and fine linen. When Dr. Campbell has finished his Chinese letters, he will be a greater simpleton than we take him for if he does not force off another 100,000 copies of his paper by launching a fresh series of thunderbolts against the powers of darkness. In the meanwhile, there can be no doubt that he is making a very good thing indeed of the spiritual wants of the Chinese."

COCKBURN, C. J. * * * It is said on behalf of the defendant, that, as the plaintiff addressed himself to the public in a matter, not only of public but of universal interest, his

conduct in that matter was open to public criticism, and I entirely concur in that proposition. If the proposed scheme were defective, or utterly disproportionate to the result aimed at, it might be assailed with hostile criticism. But then a line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives, unless there is so much ground for imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation.

In the present case, the charges made against the plaintiff were unquestionably without foundation. It may be that, in addition to the motive of religious zeal, the plaintiff was not wholly insensible to the collateral object of promoting the circulation of his newspaper, but there was not evidence that he had resorted to false devices to induce persons to contribute to his scheme. That being so, Mr. Bovill is obliged to say that, because the writer of this article had a bona fide belief that the statements he made were true, he was privileged. I cannot assent to that doctrine. It was competent to the writer to have attacked the plaintiff's scheme; and perhaps he might have suggested that the effect of the subscriptions which the plaintiff was asking the public to contribute would be only to put money into his pocket. But to say that he was actuated only by the desire of putting money into his pocket, and that he resorted to fraudulent expedients for that purpose, is charging him with dishonesty: and that is going further than the law allows.

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LEADING ILLUSTRATIVE CASES LAW OF TORTS

PART VII

INTERFERENCE WITH DOMESTIC, CONTRACTUAL AND BUSINESS RELATIONS

CHAPTER I.

INTERFERENCE WITH DOMESTIC RELATIONS.

Nature of the Wrong.

YUNDT v. HARTRUNFT.

41 Ill. 9. 1866.

This was an action of trespass vi et armis. The declaration counts for the seduction of plaintiff's wife by defendant.

WALKER, C. J. * * * In this class of cases, the loss of services may be the alleged injury, but the injury to the character of the family is the real ground of recovery when the cause of action relates to the wife or daughter. The degradation which ensues, the distress and mental anguish which necessarily follow, are the real causes of recovery. It has not been the policy of the law to confine the recovery by the injured party to the precise amount of money which he has proved he has lost by the deprivation of labor ensuing from the injury. But the law has, in a more just spirit, allowed a recovery for injury to family reputation and anguish growing out of the injury. Nor is it true, that, because appellee was absent from home, he therefore could have sustained no loss of service by reason of his wife being debauched. He had a right to her services in the nurture of his children, as well as to a virtuous example to them by her. He had the right to the teachings of a virtu-

ous and not of a depraved mother to his children. If he intrusted their care to a virtuous and undefiled mother, and appellant corrupted and debased her, he thereby became liable to appellee for the neglect of her family and her example to her children. And the circumstance that his wife died did not deprive him of his right of recovery. * * *

Husband's Recovery for Injury to Wife.

GARRISON v. SUN PRINTING & PUBLISHING ASSOCIATION.

135 N. Y. Supp. 721. 1912.

MILLER, J. The question involved in this appeal is whether a husband may maintain an action for damages for the physical illness of his wife, due to mental anguish caused by the publication of words reflecting upon her character which were libelous per se. The precise question does not appear to have been decided in this State. * * * We can perceive no reason to distinguish such an action based on a libel from one based on any other tort occasioning bodily disability. The question is whether the damages claimed are the natural and proximate consequences of the libel. The reason for excluding mental suffering as an element of damages in the case of words not actionable in themselves does not apply in the case of words libelous per se. In the former case, mental distress is not the natural and proximate result, whereas, in the latter case, it is. It necessarily causes mental suffering to hold a person up to public ridicule, disgrace, and obloquy. * * * Physical illness is certainly the natural result of mental anguish. The conclusion that the husband may maintain such an action as this for the damages sustained by him follows logically from the premise that, in a suit by the wife, mental suffering and physical illness are elements of general damages.

Wife's Right to Sue for Alienation of Husband's Affections.

WOLF v. FRANK.

92 Md. 138, 48 Atl. 132. 1900

Action by Amelia Frank against Mary J. Wolf. From a judgment in favor of plaintiff, defendant appeals. Reversed.

BOYD, J. * * * The declaration alleges that the defendant wrongfully enticed and procured the husband of the plaintiff unlawfully, and without the consent and against the will of the plaintiff, to depart and remain absent from her home and society, whereby she lost the society, support, and protection of her husband. * * *

This is the first time a suit of this character has been before this court. There has been but little, if any, difference of opinion as to the right of a husband to sue for what is termed "the loss of consortium,"—that is, the loss of his wife's society, affection, and assistance,—and when anyone, by the alienation of her affections, deprives him of his conjugal rights, he is liable to respond in damages. Indeed, such right has been sustained at least as far back as the case of Winsmore v. Greenbank, Willes 577. The authorities are not so harmonious as to the right of the wife to sue for injuries sustained by her by being unlawfully deprived of the society, affection, etc., of her husband. But the differences are as to the source of the right rather than as to whether such right exists. * * *

We have seen it stated that there are only two States in this country, in which the question has arisen, where the right of a married woman to maintain such an action is still denied. Whether that be correct or not we cannot say, but in our investigation of the authorities we have only found two, Wisconsin and Maine, although most of the decisions are based on statutes. In Duffies v. Duffies, 76 Wis. 374, 45 N. W. 522, it was decided that neither at common law nor under the statutes of that State could a wife maintain an action against one enticing away her husband for the loss of his society and support; and in Doe v. Roe, 82 Me. 503, 20 Atl. 83, affirmed in Morgan v. Martin, 92 Me. 190, 42 Atl. 354, the right is denied, apparently on other grounds. The Wisconsin case is not alone as to the right to sue at common law, and the statute in force when that case arose was held not to sustain the right of action. The case of Logan v. Logan, 77 Ind. 558, cited in Duffies v. Duffies, is practically, although not in terms, overruled in Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389, so far as it affects this question, and the case of Van Arnam v. Ayers, 67 Barb. 544, is overruled by Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17. There are other cases which have denied the

right of recovery, under the peculiar facts that were alleged or proven. * * *

But there are many authorities which sustain this character of suit. That of Foot v. Card, 58 Conn. 1, 18 Atl. 1027, is a leading one, and has taken a more advanced position than most of the others, although it has been frequently referred to by other courts. * * * Some authorities hold that the common law gives a married woman a cause of action, but by reason of her disability of coverture the right remains in abeyance while she is married. There are others in which her right to damages is regarded as belonging to her at common law, and hence she can recover under statutes enabling her to sue as a feme sole; and still others sustain her right to sue under statutes giving equal rights to husband and wife, irrespective of any substantive right existing at common law. * * * .

[The judgment of the lower court was reversed because of certain errors in the rulings, and a new trial awarded.]

Nature of the Right of Consortium.

FENEFF v. NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

203 Mass. 278, 89 N. E. 436. 1909.

Action by Melinda Feneff against the New York Central & Hudson River Railroad Company. Verdict was returned in favor of defendant, and plaintiff brings exception. Overruled.

KNOWLTON, C. J. The plaintiff's husband was injured physically and mentally by the negligence of the defendants, and he has recovered full compensation for his injuries. Feneff v. Boston & Maine Railroad, 196 Mass. 575, 82 N. E. 705. The plaintiff sues for damages suffered by her from his injury, by reason of her relation to him as his wife. In her declaration she avers that, by reason of his disability, she has endured great suffering and anxiety, and has been obliged to assume heavy and arduous duties which she did not have to assume before the injury, and that she has lost the comfort, society, aid, and assistance of her husband. In her bill of exceptions she says that the action is "for the loss of consortium." This statement covers the case. * * *

The right of consortium is a right growing out of the marital relation, which the husband and wife have, respectively, to enjoy the society and companionship and affection of each other in their life together. * * * The right to the consortium of the other spouse seems to belong to husband and wife alike, and to rest upon the same reasons in favor of each. Since the removal of the wife's disability to sue this is now settled in most courts by a great weight of authority. Nolan v. Pearson, 191 Mass. 283, 77 N. E. 890, and cases cited. * * *

The wrong which may be redressed through such suits is one which has a direct tendency to deprive the husband or wife of the consortium of the other spouse. No case has been brought to our attention, and after an extended examination we have found none, in which an action for a loss of consortium alone has been maintained merely because of an injury to the person of the other spouse, for which the other has recovered, or is entitled to recover, full compensation in his own name, when the only effect upon the plaintiff's right of consortium is that, through the physical or mental disability of the other, the companionship is less satisfactory and valuable than before the injury. * * * While there is no intentional wrong, the ordinary rule of damages goes no further in this respect than to allow pecuniary compensation for the impairment or injury directly done. When the injury is to the person of another, the impairment of ability to work and be helpful and render services of any kind is paid for in full to the person injured. Ordinarily the relation between him and others, whereby they will be detrimentally affected by the impairment of his physical or mental ability, makes the damage to them only remote and consequential, and not a ground of recovery against the wrongdoer. * * *

Parent's Action for Seduction of Daughter.

GRINNELL v. WELLS.

7 Man. & Gr. 1033 (Eng.). 1844.

Case, for the seduction of the plaintiff's daughter.

TINDAL, C. J., now delivered the judgment of the court. The question in this case arises upon a motion in arrest of

judgment, and is this—whether a father can maintain an action on the case for the seduction of his daughter, where he is unable to allege in the declaration the loss of her service by reason of the defendant's wrongful act.

The declaration in this case contains no allegation of the loss of the service of the daughter, but, instead thereof, alleges that the daughter was a poor person, maintaining herself by her labor and personal services, and not of sufficient ability to maintain herself otherwise; and, after stating that the defendant debauched her, and that she was delivered of a child, and her thereby becoming unable to work or maintain herself, alleges, as the gravamen of the plaintiff, that he, being her father, and being of sufficient ability to maintain his said daughter, was, by means of the premises, forced and obliged to, and necessarily did, maintain his said daughter, at his own charges, and did necessarily pay large divers money, and incur divers debts in and about the maintaining and nursing, etc., of his said daughter, during the time she was unable to maintain herself. And the question arises—whether the want of the allegation of the loss of service is supplied by the substitution of the before-recited allegation.

The foundation of the action by a father to recover damages against the wrongdoer for the seduction of his daughter, has been uniformly placed, from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest. * * * It has therefore always been held that the loss of service must be proved at the trial, or the plaintiff must fail. * * * It is the invasion of the legal right of the master to the services of his servant, that gives him the right of action for beating his servant; and it is the invasion of the same legal right, and no other, which gives the father the right of action against the seducer of his daughter. This distinction is most clearly and pointedly put by the court in Robert Mary's Case.

* * * * * * * * *

We therefore think, for the reasons above given, the cause of action, as stated on this record, is insufficient, and that the rule for arresting the judgment must be made absolute.

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Right of Widowed Mother to Recover for Loss of Child's Services.

HORGAN v. PACIFIC MILLS.

158 Mass. 402, 33 N. E. 581. 1893.

Action by Bridget Horgan against the Pacific Mills, a corporation, to recover for the loss of services and expenses incurred in the case of her minor child, who was injured through defendant's negligence. Plaintiff had judgment on findings of a referee, and defendant appeals. Affirmed.

FIELD, C. J. The plaintiff's daughter, when injured, was eleven years old, and it appears that she, with her sisters, one older and two younger than herself, lived with their mother, who was a widow, as members of one family, and that the children were dependent for support on the mother, and rendered some service to her "in work about the house, and in tending a small shop, which was the front room of the tenement in which they lived." In consequence of the injury the plaintiff suffered loss of her daughter's services, and was put to expense in providing medical attendance for her, and to labor and trouble in nursing and taking care of her. * * *

The tendency of modern decisions is to give to a widow left with minor children, who keeps the family together, and supports herself and them, with the aid of their services, very much the same control over them and their earnings during their minority, and to impose on her to the extent of her ability much the same civil responsibility for their education and maintenance as are given to and imposed on a father. We are of opinion that when a minor child lives with its mother, who is a widow, and the child is supported by the mother, and works for her as one of the family, the mother is entitled to recover for the loss of services of the child, and for labor performed and expenses reasonably incurred in the care and cure of the child, so far as they are the consequences of an injury to the child negligently caused by the defendant. * * *

The finding of the court seems to be for the sum found by the auditor, with interest from the date of the writ. This, we think, is correct. Judgment affirmed.

Who May Sue for Seduction—Measure of Damages.

IRWIN v. DEARMAN.

11 East 23. 1809.

Damages ultra the mere loss of service having been given against the defendant for debauching and getting with child the adopted daughter and servant of the plaintiff, by which he lost her service, the court refused to set aside the inquisition.

LORD ELLENBOROUGH, C. J. This has always been considered as an action sui generis, where a person standing in the relation of a parent, or in loco parentis, is permitted to recover damages for an injury of this nature ultra the mere loss of service. But even in the case of an actual parent, the loss of service is the legal foundation of the action. And however difficult it may be to reconcile the giving of greater damages on the other ground, the practice is become inveterate and cannot now be shaken. And having been considered, in the case of Edmondson v. Machell, 2 Term Rep. 4, to extend to an aunt, as one standing in loco parentis, I think that this plaintiff, who had adopted and bred up the daughter of a friend and comrade from her infancy, seems to be equally entitled to maintain the action, on account of the loss of service to him aggravated by the injury done to the object on whom he had thus placed his affection.

CHAPTER II.

INTERFERENCE WITH CONTRACTUAL RELATIONS.

Liability of Third Party for Inducing Breach of Contract.

LUMLEY v. GYE.

2 El. & Bl. 216 (Eng.), 75 E. C. L. 216. 1853.

[This was an action by the manager of a theatre, who had engaged Johanna Wagner, an opera singer and dramatic artiste, to sing and act exclusively for a certain period at his theatre, against the manager of another theatre who had induced Miss Wagner to break her contract and refuse to perform at the plaintiff's theatre.]

CROMPTON, J. * * * Whatever may have been the origin or foundation of the law as to enticing of servants, and whether it be, as contended by the plaintiff, an instance and branch of a wider rule, or whether it be, as contended by the defendant, an anomaly and an exception from the general rule of law on such subjects, it must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harboring and keeping him as servant after he has quitted it and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law.

I see no reason for confining the case to services or engagements under contracts for services of any particular description; and I think that the remedy, in the absence of any legal reason to the contrary, may well apply to all cases where there is an unlawful and malicious enticing away of any person employed to give his personal labor or service for a given time under the direction of a master or employer; though I by no means say that the service need be exclusive. * * *

It does not appear to me to be a sound answer to say that the act in such cases is the act of the party who breaks the contract; for that reason would apply in the acknowledged case of master and servant. Nor is it an answer to say that there is a remedy against the contractor, and that the party relies on the contract; for, besides that reason also applying to the case of master and servant, the action on the contract and the action against the malicious wrongdoer may be for a different matter; and the damages occasioned by such malicious injury might be calculated on a very different principle from the amount of the debt which might be the only sum recoverable on the contract. * * *

ERLE, J. * * * The authorities are numerous and uniform that an action will lie by a master against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present; for, there, the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract by putting an end to the relation of employer and employed; and the present case is the same. * * *

[WIGHTMAN, J., rendered a concurring opinion, and COLERIDGE, J., a dissenting opinion.]

Judgment for plaintiff.

ANGLE v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY.

151 U. S. 1. 1894.

[In this case two companies, called for convenience the Omaha and the Portage Company, had been granted lands by the State for the construction of railroads. The Portage Company had made a contract with Angle for the completion of its work. The Omaha Company, by various machinations, succeeded in getting the State grant to the Portage Company revoked and in breaking up and ruining the Portage Company. Angle was thereby prevented from carrying out the work under his contract and from earning the profits thereunder.

He recovered judgment against the Portage Company for breach of contract but could collect nothing. He thereupon brought this action against the Omaha Company for damages for maliciously interfering with the contract relation between him and the Portage Company and for inducing the Portage Company to break the said contract.

Mr. JUSTICE BREWER, after stating the case, delivered the opinion of the court. * * * It has been repeatedly held that, if one maliciously interferes in a contract between two parties and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer: Green v. Button, 2 Cr. Mees. & R. 707, in which the defendant, by falsely pretending to one party to a contract that he had a lien upon certain property, prevented such party from delivering it to the plaintiff, the other party to the contract, and was held responsible for the loss occasioned thereby. Lumley v. Gye, 2 El. & Bl. 216, in which a singer had entered into a contract to sing only at the theatre of the plaintiff, and the defendant maliciously induced her to break that contract, and was held liable to the damages sustained by the plaintiff in consequence thereof. Bowen v. Hall, 6 Q. B. D. 333, 337, in which it was held that an action lies against a third person, who maliciously induces another person to break his contract of exclusive personal service with an employer, which thereby would naturally cause, and did in fact cause, an injury to such employer. In the opinion of BRETT, L. J., it was said "that wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of Ashby v. White. If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person; or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him." Walker v. Cronin, 107 Mass. 555, in which a manufacturer was held

entitled to maintain an action against a third party who, with the unlawful purpose of preventing him from carrying on his business, wilfully induced many of his employees to leave his employment, whereby the manufacturer lost their services, and the profits and advantages which he would have derived therefrom. Benton v. Pratt, 2 Wend. 385. Rice v. Manley, 66 N. Y. 82, in which a party had contracted to sell and deliver to plaintiffs a quantity of cheese, but having been made to believe through the fraud of the defendant that the plaintiffs did not want the cheese, sold and delivered it to him, and it was held that an action could be maintained against the defendant for the damages which the plaintiffs sustained from failing to get the cheese. * * *

Under these authorities, if the Omaha Company had by its wrongful conduct simply induced the Portage Company to break its contract with Angle, it would have been liable to him for the damages sustained thereby. A fortiori, when it not only induces a breach of the contract by the Portage Company but also disables it from performance. * * *

CHAPTER III.

INTERFERENCE WITH BUSINESS OR EMPLOYMENT.

Remedy to Restrain Striking Workmen from Interfering with Employer's Business.

JERSEY CITY PRINTING COMPANY v. CASSIDY.

63 N. J. Eq. 759, 53 Atl. 230. 1902.

Bill for an injunction by the Jersey Printing Company against James Cassidy and others. Motion, on order to show cause, for an injunction to restrain defendants, former employees of the complainant, and now on strike, from unlawful interference with complainant's business, the employment of workmen, etc. Heard on bill, answer, and affidavits.

[The order was made restraining the defendants (1) "from in any manner knowingly and intentionally causing or attempting to cause by threats, offers of money * * * inducements or persuasions, to any employee under contract to render service to the complainant, to break such contract by quitting such service"; (2) "from any personal molestation of persons willing to be employed by complainant, with intent to coerce such persons to refrain from entering such employment; from addressing persons willing to be employed by complainant against their will and thereby causing them personal annoyance with a view to persuade them to refrain from such employment"; (3) "from loitering or picketing in the streets near the premises of complainant, with intent to procure the personal molestation and annoyance of persons employed or willing to be employed by complainant, with a view to cause persons so employed to quit their employment, or persons willing to be employed to refrain from such employment"; (4) "from entering the premises of complainant, against its will, with intent to interfere with its business"; (5) "from violence, threats of violence, insults, indecent talk, abusive epithets, practiced upon any persons without their consent,

with intent to coerce them to refrain from entering the employment of complainant or to leave its employment."]

STEVENSON, V. C. (orally). * * * The restraining order is based upon the theory that the right of the workman to cease his employment, to refuse to be employed, and to do that in conjunction with his fellow workmen, is just as absolute as is the right of the employer to refuse further to employ one man, or ten men, or twenty men who have heretofore been in his employment. From an examination of the cases and a very careful consideration of the subject, I am unable to discover any right in the courts, as the law now stands, to interfere with this absolute freedom on the part of the employer to employ whom he will, and to cease to employ whom he will; and the corresponding freedom on the part of the workman, for any reason or no reason, to say that he will no longer be employed, and the further right of the workmen, of their own free will, to combine and meet as one party, as a unit, the employer who, on the other side of the transaction, appears as a unit before them. Any discussion of the motives, purposes or intentions of the employer in exercising his absolute right to employ or not to employ as he sees fit, or of the free combination of employees in exercising the corresponding absolute right to be employed or not as they see fit, seems to me to be in the air. * * *

I think that it is fair to all the parties to this suit who are concerned in the maintenance of the restraining order to explain, at least in a general way, what conduct is included within its prohibition. This can be most conveniently done by making plain the most important principles embodied in the order—principles which practically have been developed by the courts of this country and England during the last five or ten years. * * *

The underlying right in this particular case under consideration, which seems to be coming into general recognition as the subject of protection by courts of equity, through the instrumentality of an injunction, appears to be the right to enjoy a certain free and natural condition of the labor market, which, in a recent case in the House of Lords, was referred to, in the language of Lord Ellenborough, as a "probable ex-

pectancy." This underlying right has otherwise been broadly defined or described as the right which every man has to earn his living, or to pursue his trade or business, without undue interference, and might otherwise be described as the right which every man has, whether employer or employee, of absolute freedom to employ or to be employed. The peculiar element of this perhaps newly recognized right is that it is an interest which one man has in the freedom of another. In the case before this court the Jersey City Printing Company claims the right, not only to be free in employing labor, but also the right that labor shall be free to be employed by it, the Jersey City Printing Company.

A large part of what is most valuable in modern life seems to depend more or less directly upon "probable expectancies." When they fail, civilization, as at present organized, may go down. As social and industrial life develops and grows more complex these "probable expectancies" are bound to increase. It would seem to be inevitable that courts of law, as our system of jurisprudence is evolved to meet the growing wants of an increasingly complex social order, will discover, define and protect from undue interference more of these "probable expectancies." * * *

It is freedom in the market, freedom in the purchase and sale of all things, including both goods and labor, that our modern law is endeavoring to insure to every dealer on either side of the market. The valuable thing to merchant and to customer, to employer and to employee, manifestly is freedom on both sides of the market. * * *

It is, however, the right of the employer and employee to a free labor market that is the particular thing under consideration in this case. A man establishes a large factory where working people reside, taking the risk of his being able to conduct his industry and offer these working people employment which they will be willing to accept. He takes the risk of destructive competition and a large number of other risks, out of which, at any time, may come his financial ruin and the suspension of his manufacturing works. But our law, in its recent development, undertakes to insure to him, not only that he may employ whom he pleases, but that all who wish to be employed by him may enter into and remain in such employ-

ment freely, without threats of harm, without unreasonable molestation and annoyance from the words, actions or other conduct of any other persons acting in combination. What is the measure or test by which the conduct of a combination of persons must be judged in order to determine whether or not it is an unlawful interference with freedom of employment in the labor market, and as such injurious to an employer of labor in respect to his "probable expectancies," has not as yet been clearly defined. Perhaps no better definition could be suggested than that which may be framed by conveniently using that important legal fictitious person who has taken such a large part in the development of our modern law during the last fifty years,—the reasonably prudent, reasonably courageous, and not unreasonably sensitive man. * * *

A man may not be liable to an action for slander for calling a workman a "scab" in the street, but if a hundred men combine to have this workman denounced as a "scab" in the street, or followed in the streets to and from his home, so as to attract public attention to him, and place him in an annoyingly conspicuous position, such conduct, the result of such combination, is held to be an invasion of the "probable expectancy" of his employer or contemplated employer, an invasion of this employer's right to have labor flow freely to him. * * *

I think it is safe to say that all through this development of strike law, during the last decade, no principle becomes established which does not operate equally upon both employer and employee. The rights of both classes are absolutely equal in respect of all these "probable expectancies." * * *

I think that the leading principle enforced in the restraining order in this case is not inconsistent with any authorities which control this court. This principle is that a combination of employers, or a combination of employees, the object of which is to interfere with the freedom of the employer to employ, or of the employee to be employed (in either of which cases there is an interference with the enjoyment of a "probable expectancy," which the law recognizes as something in the nature of property), by means of such molestation or personal annoyance as would be liable to coerce the person upon whom it was inflicted, assuming that he is reasonably courageous and not unreasonably sensitive, to refrain from

employing or being employed, is illegal, and founds an action for damages on the part of any person knowingly injured in respect of his "probable expectancies" by such interference, and also, when the other necessary conditions exist, affords the basis of an injunction from a court of equity.

The doctrine which supports that portion of the restraining order in this case which undertakes to interdict the defendants from molesting applicants for employment as an invasion of a right of the complainant, is applicable to a situation presenting either an employer or an employee as complainant, and containing the following elements:

First. Some person or persons desiring to exercise the right of employing labor, or the right of being employed to labor.

Second. A combination of persons to interfere with that right by molestation or annoyance of the employers who would employ, or of the employees who would be employed, in the absence of such molestation. How far the element of combination of a number of persons will be finally found necessary in order to make out the invasion of a legal or equitable right in this class of cases, need not be discussed. We are dealing with cases where powerful combinations of large numbers in fact exist.

Third. Such a degree of molestation as might constrain a person having reasonable fortitude, and not being unreasonably sensitive, to abandon his intention to employ or to be employed in order to escape such molestation.

Fourth. As the result of the foregoing conditions, an actual pecuniary loss to the complaining party, by the interference with his enjoyment of his "probable expectancies" in respect of the labor market. * * *

Workman's Remedy Against Third Parties Inducing His Discharge.

MINASIAN v. OSBORNE.

210 Mass. 250, 96 N. E. 1036. 1911.

Bills for an injunction by Hampartzoon Minasian and by Minas H. Minasian against Robert L. Osborne and others. There were findings for plaintiffs, and defendants appealed. Reversed, and bills dismissed.

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RUGG, C. J. The material facts which gave rise to this controversy (as found by the superior court) are that the plaintiff Minas, a skilled laster by trade, had a contract for labor as a laster with the Randall Adams Company, terminable at the will of either. With the consent of his employer, he had in turn employed as helper his father, Hampartzoon, the other plaintiff, who was not able to do all the work of a laster, and who received no wages from the Randall Adams Company and has no relation as servant to it. The work was piece work, and Minas alone received, and was entitled to receive, the compensation for their joint labor. This method of work was known in the craft as "contract" or "cross-handed."

[Both plaintiffs were or had been members of the Lasters' Union. Defendant, as business agent of the Lasters' Union No. 1, notified the employer that unless the father were discharged the shop's crew would be "pulled out." The father being retained, all the lasters went out on an orderly strike, and both plaintiffs have lost their employment. The labor market in the manufacture of shoes is substantially controlled by the Lasters' Union.]

Here is a plain and tangible injury to the plaintiffs as the proximate result of the acts of the defendants. This gives a cause of action unless the defendants have a sufficient justification for their conduct. If they have acted without good cause or excuse, they are liable. Berry v. Donovan, 188 Mass. 353, 74 N. E. 603; Quinn v. Leathem [1901] A. C. 495; South Wales Miners' Federation v. Glamorgan Coal Co. [1905] A. C. 239. As was said in De Minico v. Craig, 207 Mass. 593, 94 N. E. 317: "Whether the purpose for which a strike is instituted is or is not a legal justification for it, is a question of law to be decided by the court." * * *

The basis of the strike is objection to the system known as contract labor or cross-hand work. It follows that the real purpose of the strike is to cause the abolition of that system of work in this shop. * * * The question presented for decision is whether the abolition of this particular system of shop work is a legal justification for the interference with the rights of these plaintiffs which arises from an orderly strike by fellow employees. * * *

This is not a strike which involves any inquiry as to the

plaintiffs' habits, conduct or character which might render them unfit or improper shopmates. It is not for the establishment of any system of shop work or rules directed to the curtailment or limitation of production or interference with reasonable industrial advancement. It is not aimed to prevent the highest efficiency of labor or the use of modern or economical machinery. It was not instituted to promote a closed shop or to compel anybody to join or to leave the union, nor primarily to cause the discharge or employment of any person or class of persons. If this results in any instance, it is incidental and not essential to the chief end. It does not go to the extent of interdicting the absolute and unqualified right of the individual to work, if he desires, contrary to the will or rules of a combination. It is not based upon objections to shop rules established for the reasonable protection of the rights of the employer or promotion of the good order or economical and efficient service of employees. It is not directed against the education of apprentices or those who are trying to learn the trade. It does not appear to be for the establishment or preservation of a monopoly, and this is not indicated by the framework of the bill. It is not directed against piece work as distinguished from day work, nor against any other method of employment where superior skill, dexterity or swiftness secure commensurately higher rewards than inefficiency, carelessness or slothfulness. It does not directly or immediately affect the general convenience, necessities or safety of the public. Its ostensible object is not used as a mask for any ulterior design. The direct and main purpose is to secure a change in a system of work which is claimed to be unjust in its practical operation.

It is contended that this system in its final analysis resulted in an unequal distribution of the work of lasting in slack times, and thus affected the wages of the strikers, although it did not so operate when there was work enough to keep all the employees busy all the time. The finding of the superior court was in substance to this effect and it is supported by evidence. There is nothing to indicate that the strike was not undertaken in good faith against this system. An honest effort to better conditions of employment by laborers is lawful. The right of the plaintiffs to work upon such terms as they chose is incident

to the freedom of the individual. That right could not be taken away or interfered with by the defendants unless it came into conflict with an equal or superior right of theirs. De Minico v. Craig, 207 Mass. 593, 94 N. E. 317. The right of one person to dispose of his labor freely is not superior to the same rights in others. The right of one to work under unsanitary conditions does not go to the extent of preventing others from striking in order to secure a mitigation of these conditions merely because such a strike may interfere with the desire of the first to continue to work under those conditions. The same principle applies where a distribution of work discriminates between men of average capacity and gives an undue preference to one over another in times when there is a dearth of work. A system of giving out work which, under existing conditions, operates unjustly, is a condition of employment in which all workmen affected by it in a particular shop may have a legal interest. Nor is injury to the employer a reason why a strike to remedy such a condition should be enjoined.

The right of the employer is no more absolute in respect to a condition of employment like this than it is as to hours of labor or rate of wages. It is not a subject as to which he is entitled to special protection against an orderly and otherwise lawful strike. Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753. The conduct of these defendants, although directly affecting to their detriment the labor habits of the plaintiffs, appears to have sufficient justification in the fact that it is of a kind and for a purpose, which has a direct relation to the benefits of a more uniform distribution of work, and thus of wages, among equally skilled or competent workmen during dull seasons. * * *

Decree reversed. Bill dismissed.

LEADING ILLUSTRATIVE CASES
LAW OF TORTS

PART IX

EXTRA-HAZARDOUS OCCUPATIONS—ACTING AT PERIL—INSURING SAFETY MISCELLANEOUS

CHAPTER I.

ACTING AT PERIL—GENERAL PRINCIPLES.

Assumption of Risk by a Servant.

CROWN v. ORR.

140 N. Y. 450. 1893.

Plaintiff, nineteen years old, was employed by defendant, and was injured by defendant's alleged negligence. Judgment on verdict for plaintiff. Appeal by defendant. Reversed.

O'BRIEN, J. The relation of master and servant existed between the plaintiff and the defendant at the time the former received the personal injury for which he recovered damages. The question presented is whether, upon any view of the evidence, the result can be attributed to any fault or neglect on the part of the master. The rules of law in such cases are well settled, but it is not always easy to apply them to the varying facts in each particular case. The master does not insure the servant against all accidents and mishaps that may befall him in the business. The servant, when he enters into the relation, assumes not only all the risks incident to such employment, but all dangers which are obvious and apparent. The law imposes upon him the duty of self-protection, and always assumes

that this instinct, so deeply rooted in human nature, will guard him against all risks and dangers incident to the employment or arising in the course of the business of which he has knowledge or the means of knowledge. If he voluntarily enters into or continues in the service without objection or complaint, having knowledge or the means of knowing the dangers involved, he is deemed to assume the risk and to waive any claim for damages against the master in case of personal injury to him. This principle applies to the plaintiff, although he was not at the time of full age. Like any other servant he took upon himself the ordinary risks of the service, and all dangers from the use of machinery which were known to him, or obvious to persons of ordinary intelligence. He is bound to take notice of the ordinary operation of familiar laws, and to govern himself accordingly, and if he fails to do so, the risk is his own. He is bound to use his eyes to see that which is open and apparent to any one so using them, and if he neglects to do so he cannot charge the consequences upon the master.

The liability of the master for injuries to the servant received in the service is based upon his personal negligence, and the evidence must establish some personal fault or neglect of duty on his part, or what is equivalent thereto, in order to justify a verdict, and he is entitled to the presumption that he has performed his duty until the contrary is made to appear. * * * On the 10th of December, 1890, plaintiff, who was then about 19 years old, and in the employ of the defendant, lost his hand and part of the arm by coming in contact with the knives of a planing machine. No complaint was made that the machine was in any respect defective or unsuitable for the purpose for which it was used, or that the place where the plaintiff was directed to work was in any respect unsafe. The only omission of duty charged against the master in the complaint, or at least that is now urged, is that the plaintiff was ignorant of the use of machinery, and the defendant neglected to give proper instructions to him in this regard, or cause them to be given.

When the accident occurred, the plaintiff had been at work in the shop about three weeks. His duty was to stand a few feet from the machine and take off the dressed lumber after it had passed through the planer. * * * He was not required to operate or handle the machine itself, but was cautioned

against meddling with its operation. * * * The plaintiff testifies that on the day of the accident the man in charge ordered him to place a hood made of tin * * * in its place in front of the knives of the planer. * * * He says that while attempting to put it in place his hand was caught by the knives, and in this way the injury was sustained. * * * Assuming that the verdict has determined conclusively that the foreman ordered the plaintiff to hang this hood in place, in front of the knives of the planer, does this charge the master with personal negligence? The plaintiff had been at work in front of his machine for three weeks, and during that time had full opportunity to observe the manner of handling this hood and placing it upon the machine. He had the same opportunity of informing himself with respect to any danger attending such an act as the master had. There was nothing in the operation that called for any special instructions, and he asked for none. It was not negligence to direct a young man 19 years of age, who had seen the machine in operation for three weeks, to perform such a duty, even without instructions, especially when he asked for none and gave no sign that he was not entirely familiar with the method by which the order could be properly obeyed. This was one of the risks which he assumed when he entered the defendant's service. * * * It is admitted that proper instructions were given him to perform his work with safety, and if it be true, as the plaintiff testifies, that on the occasion in question he was directed to perform another, and specially dangerous service, without sufficient instruction, that fault was not that of the master, but that of a co-servant. * * * The judgment, therefore, should be reversed.

Assumption of Risk by a Trespasser.

RYAN v. TOWAR.

128 Mich. 463, 87 N. W. 645. 1901.

HOOKER, J. The Brice Manufacturing Company is an existing corporation, which formerly carried on business at Marquette. Its plant has been shut down for some years. Among other structures, it owned a small pump-house, located upon

ground owned by a railroad company. In the house was a small over-shot wheel. Plaintiff, a girl between 12 and 13 years of age, was in the habit of passing this pump-house on the way to school, with her brothers and sisters; going across lots through the field, because it was nearer. For some time previous to the accident a hole existed in the wall of the pump-house, through which children went to play on the wheel. On the day in question, plaintiff's younger sister got caught in the wheel, and plaintiff went to her succor, and was herself injured. Suit was brought against the corporation and two of its directors, alleging negligence in permitting the wheel to remain there, accessible to children. From a directed verdict in favor of the directors, and judgment thereon, plaintiff appeals.

The testimony shows that the buildings were upon land fenced. The plaintiff was not shown to have been invited upon the premises, but there is testimony from which the jury might reasonably conclude that children were in the habit of crossing the land of the defendant company and the railroad, and that neither company took steps to prevent it further than to keep up the fences. It is contended that this amounted to an invitation or license, but we think not. Mere toleration of a trespass does not alone constitute a license even, certainly not an invitation. * * *

It is a general and nearly uniform rule that there is no duty imposed upon the owner of premises to keep them in a suitable condition for those who come there for their own convenience merely, without the invitation of the owner. The origin of the alleged modern doctrine may be said to rest upon what are called the "Turntable Cases," the first of which was the case of Railroad Co. v. Stout, 17 Wall. 657. * * * A child of 6 years was hurt while playing with others upon a turntable. * * * The turntable was in a remote place, not far from a public highway, on ground belonging to the company. * * * The only question in the case was whether the child was a trespasser, and for that reason could not recover. This case practically laid down the rule "That a railroad company might be liable to trespassers for injuries resulting from its failure to construct, locate, manage and maintain its turntable with that care and attention to prevent accidents which prudent and careful men ordinarily bestow." * * *

The enunciation by the highest tribunal in the country of the rule that a landowner owes a duty of care towards a trespasser was sure to be followed by other courts. * * * In Kansas the doctrine was applied in a case of a turntable located in the midst of an open prairie, and a boy 12 years old. Here we have the doctrine of the Turntable Cases carried to its logical result. We have only to assume that every man who leaves a wheelbarrow, or a lawn mower, or a spade upon his lawn; a rake, with its sharp teeth pointing upward, upon the ground or leaning against the fence; a bed of mortar prepared for his new house; a wagon in his barn-yard, upon which children may climb, and from which they may fall; or who turns into his lot a kicking horse or a cow with a calf—does so at the risk of having the question of his negligence left to a sympathetic jury. * * *

The great weight of authority does not sustain the principle of the Turntable Cases. While some of the courts have followed the rule of Railroad Co. v. Stout, both the courts and profession have evinced a tendency to allow this innovation to go no further, and refuse to consider it applicable to other cases in every way analogous. They speak of the cases generically, as the "Turntable Cases," and treat them as exceptional. We are of the opinion that they are exceptional, and that they are not based upon principle, but contravene one of the old and well-established rules of the law; and we therefore decline to recognize them as authority, preferring to adhere to the better doctrine of the other cases cited. The defendant owed no duty to these children, who were trespassers. * * * The judgment is affirmed.

CHAPTER II.

LIABILITY FOR ANIMALS.

Trespassing Animals.

WELLS v. HOWELL.

19 Johnson 385 (N. Y.). 1822.

Howell sued Wells in Justice's court, declaring that Wells' horse had damaged plaintiff in the sum of ten dollars, by entering plaintiff's field and destroying grass therein. Wells, admitting the trespass and amount of damage, defended on the ground that there was no fence around the field. This was admitted, and that there was no town ordinance about fences, or cattle running at large. Judgment for plaintiff, Howell.

PER CURIAM. Every unwarrantable entry on another's land is a trespass, whether the land be enclosed or not. 3 Bl. Com. 209; 3 Selwyn's N. P. 1101. A person is equally answerable for the trespass of his cattle as of himself. 3 Bl. Com. 211. The defendant below was bound to show a right to permit his cattle to go at large; and it is conceded that there was no town regulation on the subject. The judgment must be affirmed.

Liability for Acts of Horses.

REYNOLDS v. HUSSEY.

64 N. H. 64. 1886.

Trespass on the case for injury to plaintiff caused by defendant's horse striking him with the fore feet while standing harnessed to a wagon, and left unattended. The vicious character of the horse, and knowledge thereof by defendant, were alleged. Evidence was admitted, showing that the horse was a notorious kicker—that it kicked at people in the barn, in the stall,

harnessed in the wagon; defendant did not deny knowledge of the horse's kicking, but claimed to know nothing of its rearing and striking with the fore feet.

Defendant asked a charge that he was not liable unless it was shown that at some time prior to the accident he had known of the horse striking with its fore feet. The court instructed the jury that if they found the horse had a vicious disposition, and was inclined to injure mankind, so that defendant, as a reasonable man, knew that it would be disposed to commit acts similar to the one sued for, it would be such knowledge on his part as might make him liable; defendant excepted.

BLODGETT, J. * * * It is not necessary that the vicious acts of a domestic animal brought to the notice of the owner should be precisely similar to that upon which the action against him is founded. If it were, there would be no actionable redress for the first injury of a particular kind committed by such animal, because its owner would necessarily be exempt from all liability until it should commit another injury of exactly the same kind. It is enough to say that the law sanctions no such absurdity.

* * * It is the propensity to commit the mischief that constitutes the danger, and therefore it is sufficient if the owner has seen or heard enough to convince a man of ordinary prudence of the animal's inclination to commit the class of injuries complained of. The question in each case is, whether the notice was sufficient to put the owner on his guard, and to require him, as an ordinarily prudent man, to anticipate the injury which has actually occurred. Hence it is unnecessary to prove more than that he has good cause for supposing that the animal may so conduct. And a good cause for so supposing in the present case was the defendant's knowledge that the animal was of vicious disposition and "a notorious kicker;" and the jury might well conclude from these undisputed facts alone that the defendant had sufficient knowledge of its vicious nature and propensity to make him liable for the subsequent attack on the plaintiff in consequence of that nature and propensity. For when it is made to appear that any domestic animal is vicious and inclined to do hurt, and the owner has notice, express or implied, of the fact, the law then imposes upon him the

duty to keep the animal secure, and makes him liable to any person who, without contributory negligence upon his part, is injured by it. And this rule is so entirely reasonable, and is so strictly in accordance with the legal and moral duty obligatory upon everybody to so keep and use his own property as not to wrong and injure others, that authorities need not be cited in its support.

The instruction asked was not correct. As modified by the court, it was sufficiently favorable to the defendant. Exceptions overruled.

CHAPTER III.

LIABILITY FOR INANIMATE FORCES.

Damages Caused by Blasting.

HAY v. THE COHOES COMPANY.

2 N. Y. 159. 1848.

Plaintiff's declaration alleged that defendant company wrongfully blasted and threw large quantities of earth, gravel, slate and stones upon plaintiff's house and premises, and shut and darkened his windows, broke his windows and doors, etc. Plea of not guilty. Plaintiff's evidence tended to prove that defendants, in excavating a canal upon their own land, knocked down the stoop to plaintiff's house, and part of the chimney, and placed boards on all the front windows of his house, obstructing the light, etc. Defendants contended that the burden was on plaintiff to allege and prove negligence, unskilfulness, wantonness or delay, and that he had failed to do this. Plaintiff was nonsuited in the trial court, but the Supreme Court reversed the judgment and granted a new trial, from which decision defendants appealed to the Court of Appeals.

GARDNER, J. * * * It is an elementary principle in reference to private rights, that every individual is entitled to the undisturbed possession and lawful enjoyment of his own property. The mode of enjoyment is necessarily limited by the rights of others—otherwise it might be made destructive of their rights altogether. * * * The defendants had the right to dig the canal, the plaintiff had the right to the undisturbed possession of his property. * * *

No one questions that the improvement contemplated by the defendants upon their own premises were proper and lawful. The means by which it was prosecuted were illegal notwithstanding. For they disturbed the rightful possession of the plaintiff and caused a direct and immediate injury to his property. For the damages resulting, the defendants are liable. * * * The judgment of the Supreme Court should be affirmed.

Liability for Electricity.

BRAUN v. BUFFALO GEN. ELEC. CO.

200 N. Y. 484, 94 N. E. 206. 1911.

HISCOCK, J. While plaintiff's intestate was engaged as a carpenter in the erection of a building on private premises in the city of Buffalo, he took hold of two wires strung and maintained by the respondent across said premises and carrying an electric current of a high voltage. Inasmuch as the insulation on these wires had become ragged and defective there followed the quite inevitable result—death of the man. The learned courts below have unanimously decided that the intestate was killed without legal responsibility on the part of the respondent for the part it took in bringing about this result, and in determining whether this conclusion was justified we are called on to consider the rule of care and responsibility which governs a company carrying wires charged with dangerous currents of electricity over private premises in the midst of a large and thickly populated city. * * *

As a preliminary general consideration counsel for the respondent, in view of the evidence that the insulation such as was originally placed on the wires would be effective for only three years, argues that it would be a great hardship to require a company like the respondent to renew this insulation so frequently, and that as a matter of general policy we should not impose any such burden. It is probable that the weight of the burden is somewhat exaggerated, but however that may be, this argument does not impress us as being very decisive of the rule which should be applied in this or similar cases. It is a matter of common knowledge that a company like the respondent for its own profit ordinarily installs and maintains its wires across private premises without compensation. In a large city overhead wires are apt to be numerous, and there are no such marked characteristics of the different ones as would enable an ordinary layman to distinguish between those which are comparatively harmless, like a telephone wire, and those which are charged with a deadly current like those here. While the convenience of electric and telephone wires is obvious and their maintenance should not be burdened with excessive liabilities, still it seems

clear that a company maintaining dangerous wires should not be relieved on the ground of expense from the affirmative duty of exercising a reasonable degree of care to maintain a proper insulation and thereby prevent accidents reasonably to be apprehended to those lawfully coming in the neighborhood of such wires. * * *

Little need or can be said about the condition of the wires, for if the respondent owed any obligation whatever of making them safe it would scarcely have been more negligent if, instead of allowing them to remain uninspected and unrepaired as it did, it had strung and maintained absolutely naked wires. The only question which is at all close is whether the respondent in the exercise of reasonable care and foresight would have apprehended that the premises over which the wires were strung might be so used as to bring people in contact with them, and whether, therefore, it should have guarded against such a contingency. As indicated, I think this was fairly a question for the jury. * * * For these reasons I recommend that the judgment of both courts be reversed and a new trial granted. * * * Judgment reversed.

Damages Caused by Poisons.

SUTTON'S ADM'R v. WOOD ET AL.

120 Ky. 23, 8 Anno. Cas. 894. 1905.

Plaintiff's decedent sent her boy to the drug store for some morphine. One of the members of the drug firm was not a registered pharmacist, nor did he understand mixing drugs nor anything technically of their nature and effects. It was claimed that he gave the boy strychnine instead of morphine, and failed to place upon the outside of the package a strychnine label containing the names of two or more common antidotes for that poison. Decedent asked her daughter to give her some morphine, some days after the above purchase was made. The girl, without unwrapping the package fully, gave her mother a dose of what they both supposed was morphine, but which proved to be strychnine. The state statutes provided that only licensed pharmacists should put up drug prescriptions, and that whenever poisons were sold they should be labeled as such, two or more

common antidotes named on the label, and a record should be kept of the person buying the poison, his residence, the purpose for which it was to be used, the amount sold, etc. A penalty was provided for the violation of these provisions of the statute. Suit brought against all the members of the drug firm for damages for negligence in sending decedent the wrong drug. Judgment for defendants. Plaintiff appealed. Reversed.

O'REAR, J. * * * When, however, damage results from the neglect, the fact that it may also be punished as an offense against the criminal law will not prevent one specially damaged by it from recovering for it. * * * Before the statute above quoted an action would lie against a druggist who negligently furnished a customer a poisonous drug, instead of some other and different one which had been bought of him, not calling the customer's attention to the substitution, where damage resulted from the act. By the statutes regulating the practice of pharmacy a comprehensive system has been devised, to guard the public against incompetent, inexpert handlers of subtle, dangerous drugs, designed and sold to be administered to people. Great care has been observed in prescribing rules which, in their application, are believed to minimize the dangers incident to this business. As the legislation was to enhance the public's protection, the duties imposed on the druggists were intended as statutory tests of care, in so far as the statutes went. Their nonobservance is per se neglect of duty, as well as neglect of care. When special damage flows from it, there exists prima facie a case of actionable negligence. * * *

It is not true, either, as stated in the sixth instruction, that the druggist and the customer are under the same degree of care in the furnishing and taking the drug. The fact alone that one is prohibited from acting in the matter at all, except under a license, and after a technical training, evinces that between the care to be observed by the pharmacist and by his customer, there is a difference, and a necessary one. The customer's duty is to exercise ordinary care for his own safety; the druggist's, to exercise the highest degree of care for the safety of the public dealing with him. The judgment must be reversed. * * *

CHAPTER IV.

LIABILITY FOR INJURIES FROM LAWFUL USE OF ONE'S LAND.

Waters Artificially Collected.

RYLANDS v. FLETCHER.

L. R., 3 H. L. 330 (Eng.). 1868.

Fletcher sued Rylands in the Court of Exchequer for damages resulting from water overflowing into Fletcher's mines from a reservoir which the defendant had built. Judgment for defendant.

Judgment was reversed in the Court of Exchequer Chamber, and defendant brought the case to the House of Lords on error.

THE LORD CHANCELLOR (LORD CAIRNS). * * * The same result is arrived at on the principles referred to by Mr. Justice Blackburn in his judgment in the Court of Exchequer Chamber, where he states the opinion of that court as to the law in these words: "We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God; but as nothing of the sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth from his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works,

is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have accrued; and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

My lords, in that opinion I must say I entirely concur.

* * * * * * * * *

LORD CRANWORTH. My lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice Blackburn in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage. * * * The plaintiff had a right to work his coal through the lands of Mr. Whitehead, and up to the old workings. If water naturally rising in the defendants' land (we may treat that land as the land of the defendants for the purpose of this case) had by percolation found its way down to the plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. * * * But that is not the real state of the case. The defendants, in order to effect an object of their own, brought on to their land a large quantity of accumulated water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff; and for that damage, however skilfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible. * * *

Judgment of the Court of Exchequer Chamber affirmed.

Pollution of Waters.

HAUCK v. TIDEWATER PIPE LINE CO.

153 Pa. St. 366. 1893.

Defendants were a limited partnership company, in the business of laying pipes and carrying oil through the same in the oil region of Pennsylvania. The business relating to the present suit was conducted entirely upon defendants' premises, although the oil was brought from elsewhere. Plaintiffs alleged that by reason of percolating oil escaped from defendants' pipes, the springs and mill pond of plaintiffs had been polluted, which caused the death of the fish in the pond, and rendered plaintiffs' house unfit for residence. Defendants had no power of eminent domain. Verdict and judgment for plaintiffs, from which defendants appealed. Affirmed.

PAXSON, C. J. * * * The point (defendants' fourth) was as follows: "That the defendant is not liable for damages resulting from its business by reason of oil escaping from its own lands where it is being handled, except such oil escapes through negligence of the company or its agents."

This point presents the main feature of the case. The court below refused it, upon the ground that it was a question of nuisance and not of negligence, citing Pottstown v. Murphy, 39 Pa. 257, in support of this view. In that case it was held that the gas company was answerable for consequential damages, such as the corruption of the plaintiff's ground and well, by the fluids percolating from the works; and that a corporation is exempt from consequential damages only where, being clothed with the State's right of eminent domain, it takes private property for public use upon making proper compensation, and where such damages are not part of the compensation required.

We think the learned judge was right under the authority above cited, in holding that this was not a case of negligence, but of nuisance or of consequential damages. * * *

We think the case closely resembles that of Robb v. Carnegie, 145 Pa. 324, in which it was held that the owners of coke ovens, the gases from which injured the growing crops upon the adjoining farm, were liable in damages to the owner of said farm

for such injury. An attempt was made in that case, as it has been made in this, to bring it within the doctrine of Penn. Coal Co. v. Sanderson, 113 Pa. 126. In the latter case the injuries complained of were the natural and necessary result of the development by the owner of the resources of his own land. In opening a drift for the purpose of mining coal, the mine water, impregnated with the impurities which it had taken up from the earth, coal and other minerals in the mines, either flowed from the mouth of the drift or was pumped from the mines, and allowed to take its natural course on its way to the ocean. It will thus be seen that the flow of mine water was the natural and necessary result of the development by the owner of his own property. This was not the case in Robb v. Carnegie, nor is it the case here. In Robb v. Carnegie the refuse coal which was used for making coke was not mined upon the premises of the company, but was brought from other mines at a distance. In the case in hand the oil which was the cause of the injury to the plaintiff's property was brought from a distance, allowed to escape from the pipes and to percolate through plaintiff's land and destroy his springs. * * *

As was correctly said by the learned judge in a portion of his charge * * * "If the mere fact that the business is a lawful business, and has been conducted with care, would be a defense where a neighbor's land had been injured in consequence of the business carried on there, the escape of gas, for instance, or the escape of oil, the result would be that a man might lose his farm,—might be compelled to leave it and have no compensation, simply because the business which brought about this loss was a lawful business and was carried on carefully. That is not the law. No man's property can be taken, directly or indirectly, without compensation, under the law of this State. Hence there are cases, and a great many of them, where a defendant is held liable in damages, although his business is lawful and he has exercised care in carrying it on."

In the consideration of this class of cases care must be taken to distinguish between the natural and necessary development of the land itself and injuries resulting from the character of some business not incident and necessary to the development of the land or the minerals or other substances lying within it.

CHAPTER V.

JOINT TORT-FEASORS.

What Constitutes a Joint Tort.

MASON v. COPELAND & CO.

27 R. I. 232. 1905.

DUBOIS, J. The plaintiff has brought this action for negligence against a copartnership and a corporation, and charges in the first count of his declaration that the copartners, proprietors of a livery stable, let out to the plaintiff, for the use of his wife, horses and a carriage in charge of their servant, a driver, and that he so negligently drove and managed the horses that they became frightened and unmanageable and ran away, upsetting the carriage and injuring the wife of the plaintiff to his damage.

The second count charges the copartners with negligence in letting the horses, which they knew, or ought to have known, were dangerous, easily frightened, and likely to become unmanageable.

The third count is against the firm and The Rhode Island Company, a corporation, jointly, for the negligence of the driver in managing the horses and the negligence of the motorman of the company in bringing a car under his control to a sudden stop, just behind the carriage in which plaintiff's wife was seated, by applying the brakes in such a manner as to cause a terrifying noise, or shriek, so that, by reason of the simultaneous and concurrent negligence of the driver and motorman, the horses became frightened, ran away, and overturned the carriage, injuring plaintiff's wife, etc.

The fourth count alleges a further joint negligence on the part of the firm and corporation by combining together negligence of the copartnership in furnishing the unsafe horses, as set out in the second count, and negligence of the motorman

of the corporation in running its car violently against the rear of the carriage, thus causing injury to plaintiff's wife.

(The fifth and sixth counts charge negligence against the corporation only, as set forth in the third and fourth counts, respectively.) * * * As fully explained in Phenix Iron Foundry v. Lockwood, 21 R. I. 556, the statute does not authorize the joinder of distinct causes of action against separate defendants.

The plaintiff is mistaken in saying that in the case at bar there is only one cause of action, one injury, and one damage, and that the only question is which of two parties, if either, is responsible. The duty which the defendant firm owed to the plaintiff is essentially different from that imposed upon the street railway corporation, and the tort of the former, which is alleged to consist in letting horses known to be intractable or in charge of an incompetent driver, is not the same tort as that charged upon the latter which consisted in negligently stopping a car to the injury of a person not a passenger thereon, although the two torts may have culminated in one injury. * * * If the declaration is true, both parties are responsible in separate actions. The case does not present the concurrence of intention in the commission of a tort which is necessary to make a joint tort; the mere unintentional concurrence of the acts of two distinct parties resulting in damage to the plaintiff does not give him an action against both parties jointly, but a separate action against each of them. * * *

For these reasons the demurrer must be sustained. Case remitted.

RAILWAY CO. v. DURAND.

65 Kan. 380. 1902.

A hack driver negligently drove his vehicle upon the railroad track at a crossing in front of a train. The railroad company's servants negligently ran the train into the hack. A passenger in the hack was injured, and brought a joint action against the hack driver and the railroad company.

DOSTER, C. J. That the carrier of the passenger may be under a greater obligation of prudence and caution than the

driver of the train or other vehicle does not change the rule of joint liability. The carrier may be required to use extraordinary care, the other only ordinary care. That, however, does not excuse the latter from using such measure of caution as the law imposes on him. It is no answer for him to say that, while he failed to observe the minor degree of prudence required of him, the other party failed to observe the greater degree required of him. The question of joint liability in such cases cannot be affected by the comparative culpability of the offenders. If the neglect of one to exercise the extraordinary degree of diligence required of him conjoins the neglect of another to use the lesser degree of diligence required of him, to the injury of a third person, such injury is none the less the single result of the two negligent acts or omissions of duty. It is well settled that the law will not undertake to apportion consequences between two or more persons jointly guilty of wrongful conduct toward another, though their contributions to the injury were in unequal degrees or from different motives; and it must be the same rule applies where the injury was wrought by the neglect of differing degrees of responsibility.

LEADING ILLUSTRATIVE CASES LAW OF FELLOW-SERVANT AND COMPENSATION

CHAPTER I.

THE MASTER'S DUTIES TO THE SERVANT—FELLOW-SERVANT DOCTRINE.

FARWELL v. BOSTON, ETC., RAILROAD CORPORATION.

4 Met. 49 (Mass.). 1842.

Action by an engineer against the railroad company employing him for injuries received by him, while running his locomotive, in consequence of the negligence of a switchman of the company in the management of the switches.

SHAW, C. J. This is an action of new impression in our courts, and involves a principle of great importance. It presents a case, where two persons are in the service and employment of one company, whose business it is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the same purpose—that of the safe and rapid transmission of the trains; and they are paid for their respective services according to the nature of their respective duties, and the labor and skill required for their proper performance. The question is, whether, for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer. It is an argument against such an action, though certainly not a decisive one, that no such action has before been maintained.

It is laid down by Blackstone, that if a servant, by his negligence, does any damage to a stranger, the master shall be

answerable for his neglect. But the damage must be done while he is actually employed in the master's service; otherwise, the servant shall answer for his own misbehavior. 1 Bl. Com. 431; M'Manus v. Crickett, 1 East 106. This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another shall thereby sustain damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far as the act of the master, that the latter shall be answerable civiliter.

But this presupposes that the parties stand to each other in the relation of strangers, between whom there is no privity; and the action, in such case, is an action sounding in tort. The form is trespass on the case, for the consequential damage. The maxim respondeat superior is adopted in that case from general considerations of policy and security.

But this does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and the servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated.

The same view seems to have been taken by the learned counsel for the plaintiff in the argument; and it was conceded, that the claim could not be placed on the principle indicated by the maxim respondeat superior, which binds the master to indemnify a stranger for the damage caused by the careless, negligent or unskilful act of his servant in the conduct of his affairs. The claim, therefore, is placed, and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties, applicable to this point, it is placed on the footing of an implied contract of indemnity, arising out of the relation of master and servant. It would be an implied promise, arising from the duty of the master to be responsible to each person employed by him, in the conduct of every branch of business, where two or more persons are employed, to pay for

all damages occasioned by the negligence of every other person employed in the same service. If such a duty were established by law—like that of a common carrier, to stand all losses of goods not caused by the act of God, or of a public enemy; or that of an innkeeper, to be responsible, in like manner, for the baggage of his guests—it would be a rule of frequent and familiar occurrence, and its existence and application, with all its qualifications and restrictions, would be settled by judicial precedents. But we are of opinion that no such rule has been established, and the authorities, as far as they go, are opposed to the principle. Priestly v. Fowler, 3 Mees. & Welsb. 1; Murray v. South Carolina Railroad Co., 1 McMullan 385.

The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents in assuming the very point which remains to be proved. They are his agents to some extent, and for some purposes; but whether he is responsible, in a particular case, for their negligence, is not decided by the single fact that they are, for some purposes, his agents.

* * * * * * * * * *

If we look from considerations of justice to those of policy, they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties

legally inferred from a consideration of what is best adapted to promote the benefits of all persons concerned, under given circumstances.

To take the well-known and familiar cases already cited: a common carrier, without regard to actual fault or neglect in himself or his servants, is made liable for all losses of goods confided to him for carriage, except those caused by the act of God or of a public enemy, because he can best guard them against all minor dangers, and because, in case of actual loss, it would be extremely difficult for the owner to adduce proof of embezzlement, or other actual fault or neglect on the part of the carrier, although it may have been the real cause of the loss. The risk is therefore thrown upon the carrier, and he receives, in the form of payment for the carriage, a premium for the risk which he thus assumes. So of an innkeeper; he can best secure the attendance of honest and faithful servants, and guard his house against thieves. Whereas, if he were responsible only upon proof of actual negligence, he might connive at the presence of dishonest inmates and retainers, and even participate in the embezzlement of the property of the guests, during the hours of their necessary sleep, and yet it would be difficult, and often impossible, to prove these facts.

The liability of passenger carriers is founded on similar considerations. They are held to the strictest responsibility for care, vigilance, and skill, on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the risk upon those who can best guard against it. Story on Bailments, Sec. 590 and seq.

We are of opinion that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents, as the safety of the whole party may require. By these means, the safety of each will be much more effectually

secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrongdoer. See Winterbottom v. Wright, 10 Mees. & Welsb. 109; Milligan v. Wedge, 12 Adolph. & Ellis, 737.

In applying these principles to the present case, it appears that the plaintiff was employed by the defendants as an engineer, at the rate of wages usually paid in that employment, being a higher rate than the plaintiff had before received as a machinist. It was a voluntary undertaking on his part, with a full knowledge of the risks incident to the employment; and the loss was sustained by means of an ordinary casualty, caused by the negligence of another servant of the company. Under these circumstances, the loss must be deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed; and like similar losses from accidental causes, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default; of which we give no opinion.

It was strongly pressed in the argument, that although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security, yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish, what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant

must they be, to be in the same or different departments. In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a ropewalk, several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together.

Besides, it appears to us, that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow-servant, does not depend exclusively upon the consideration, that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability, when it does not arise from express or implied contract, or from a responsibility created by law to third persons, and strangers, for the negligence of a servant.

A case may be put for the purpose of illustrating this distinction. Suppose the road had been owned by one set of proprietors whose duty it was to keep it in repair and have it at all times ready and in fit condition for the running of engines and cars, taking a toll, and that the engines and cars were owned by another set of proprietors, paying toll to the proprietors of the road, and receiving compensation from passengers for their carriage; and suppose the engineer to suffer a loss from the negligence of the switch-tender. We are inclined to the opinion that the engineer might have a remedy against the railroad corporation; and if so, it must be on the ground, that as between the engineer employed by the proprietors of the engine and cars, and the switch-tender employed by the corporation, the

engineer would be a stranger, between whom and the corporation there could be no privity of contract; and not because the engineer would have no means of controlling the conduct of the switch-tender. The responsibility which one is under for the negligence of his servant, in the conduct of his business, towards third persons, is founded on another and distinct principle from that of implied contract, and stands on its own reasons of policy. The same reasons of policy, we think, limit this responsibility to the case of strangers, for whose security alone it is established. Like considerations of policy and general expediency forbid the extension of the principle, so far as to warrant a servant in maintaining an action against his employer for an indemnity which we think was not contemplated in the nature and terms of the employment, and which, if established, would not conduce to the general good.

In coming to the conclusion that the plaintiff, in the present case, is not entitled to recover, considering it as in some measure a nice question, we would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be varied and modified by circumstances not appearing in the present case, in which it appears that no wilful wrong or actual negligence was imputed to the corporation, and where suitable means were furnished and suitable persons employed to accomplish the object in view. We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam engine; whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of wilful misconduct or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an incorporated company—are questions on which we give no opinion. In the present case, the claim of the plaintiff is not put on the ground that the defendants did not furnish a sufficient engine, a proper railroad track, a well constructed switch, and a person of suitable skill and experience to attend it; the gravamen of the complaint is, that the person was chargeable with negligence in not changing the switch, in the particular

instance, by means of which the accident occurred, by which the plaintiff sustained a severe loss. * * * Upon this question, supposing the accident to have occurred, and the loss to have been caused, by the negligence of the person employed to attend to and change the switch, in his not doing so in the particular case, the court are of the opinion that it is a loss for which the defendants are not liable, and that the action cannot be maintained.

Plaintiff nonsuit.

CRISPIN v. BABBITT.

81 N. Y. 516. 1880.

Appeal from judgment of the General Term, affirming a judgment in favor of plaintiff, entered upon verdict, and affirming an order denying a motion for a new trial.

This action was brought to recover damages for injuries alleged to have been sustained by defendant's negligence.

At the time of the accident, plaintiff was working as a laborer in the iron works of the defendant. Plaintiff had assisted to draw a boat into a dry dock connected with the works; after which it became necessary to pump out the water by means of a pump worked by an engine. While plaintiff, with others, was engaged in lifting the flywheel of the engine off its centre, one John L. Babbitt, carelessly let the steam on and started the wheel, throwing the plaintiff on the gearing wheels, and thus occasioning the injuries complained of. Defendant lived in New York City, coming about once a month, for a day or two, to the iron works, of which, as the evidence tended to show, said Babbitt had general charge, being at one time the general superintendent and manager, at another time styled the "business and financial man."

RAPALLO, J. The liability of a master to his servant for injuries sustained while in his employ, by the wrongful act of another employe of the same master, does not depend upon the doctrine of respondeat superior.

If the employe whose negligence causes the injury is a fellow-

servant of the one injured, the doctrine does not apply. Conway v. Belfast, etc., Ry. Co., 11 Irish C. L. 353.

A servant assumes all risk of injuries incident to and occurring in the course of his employment, except such as are the result of the act of the master himself, or of a breach by the master of some term, either express or implied, of the contract of service, or of the duty of the master to his servant, viz.: to employ competent fellow-servants, safe machinery, etc. But for the mere negligence of one employe, the master is not responsible to another engaged in the same general service.

The liability of the master does not depend upon the grade or rank of the employe whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow-servant of the other operatives. (Citing authorities.) On the same principle, however low the grade or rank of the employe, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master, which he has confided to such inferior employe. On this principle the Flike case, 53 N. Y. 549, was decided.

CHURCH, C. J., says, at page 553: "The true rule, I apprehend, is to hold the corporation liable for negligence in respect to such acts and duties as it is required to perform as master, without regard to the rank or title of the agent intrusted with their performance. As to such acts the agent occupies the place of the corporation, and the latter is liable for the manner in which they are performed."

The liability of the master is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employe performing it. If it is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance.

The converse of the proposition necessarily follows. If the act is one which pertains only to the duty of an operative, the employe performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow-servant for its improper performance. Wood's Master and Servant, Sec.

438. The citation which the court read to the jury from 21 Am. Rep. 2, does not conflict with, but sustains, this proposition; it says:

"Where the master places the entire charge of his business in the hands of an agent, the neglect of the agent in supplying and maintaining suitable instrumentalities for the work required is a breach of duty for which the master is liable." These were master's duties. In so far as the case from which the citation is made goes beyond this, I cannot reconcile it with established principles. In England, by a late act of Parliament, the rules touching the point now under consideration have been modified in some respects, but in this state no such legislation has been had.

The point is sharply presented in the present case, by the 13th, 14th and 17th requests to charge. 13th. That although John L. Babbitt may, as financial agent or superintendent, overseer, or manager, have represented defendant, and stood in his place, he did so only in respect of those duties which the defendant had confided to him as such agent, superintendent, overseer, or manager.

This the court charged.

14th. That as to any other acts or duties performed by him in and about the defendant's works or business at said works, he is not to be regarded as defendant's representative, standing in his place, but as an employe or servant of the defendant, and a fellow-servant of the plaintiff.

This the court refused to charge, but left as a question of fact to the jury, and defendant's counsel excepted. I think this was a question of law, and that the court erred in submitting it to the jury, but should have charged as requested.

The court was further specifically requested to charge that in letting on the steam John L. Babbitt was not acting in defendant's place.

This, I think, was a sound proposition, as applied to the present case. It was the act of a mere operative for which the defendant would be liable to a stranger, but not to a fellow-servant of the negligent employe. As between master and servant, it was servant's and not master's duty to operate the machinery.

The judgment should be reversed.

MAST v. KERN.

34 Ore. 247. 1898.

Action to recover damages for an injury alleged to have been sustained through defendant's negligence. At the time of the accident which caused his injury, the plaintiff was, and for some time had been, working for the defendant in a stone quarry at Coos Bay, engaged with other employes in excavating and removing rock by blasting, under the direction and supervision of one West, the superintendent and manager, with power to hire and discharge employes. On the day of the accident the plaintiff and a fellow-workman had drilled a hole in the rock, preparatory to putting in a blast; but, before loading it, the superintendent dropped in the hole two or three sticks of giant powder, which he caused to be exploded for the purpose of drying it out. After waiting a few minutes for any fire which the powder might leave in the hole to expire, West inquired of plaintiff whether he thought it was ready to load, and the plaintiff replied, "I don't know whether it is or not." West then said, "I guess it is all right; we will try it," and poured some powder into the hole; and, as it did not take fire, he said he thought it was safe, and directed the plaintiff and his fellow-workman to put in the black powder; and while they were engaged in doing so an explosion occurred, by which plaintiff received the injury for which he brings this action. The ground of recovery alleged is that West was negligent in not waiting a sufficient length of time for the hole to cool after the giant powder had been exploded therein, and in not ascertaining whether there was any fire remaining in the hole, before directing the plaintiff and his fellow-workman to put the black powder in. The court below direct a nonsuit, and plaintiff appeals.

BEAN, J. The motion for nonsuit was, it is stated in the briefs, allowed on the ground that when the plaintiff, with full knowledge of the situation, without protest or objection, undertook to load the hole as directed by West, he knowingly and voluntarily assumed the risks of a premature explosion; and we are not prepared to say at this time that the court was in error in so ruling. Brown v. Lumber Co., 24 Or. 315. But however that may be, the judgment of nonsuit must be sustained

for the reason that the negligence of West, if any, was, under the circumstances, the negligence of a co-servant, for which the defendant is not liable. It is familiar law that a servant assumes, as one of the incidents of his employment, all risks of injury from the negligence of a fellow-servant, because the master cannot, by the exercise of the utmost care and caution, guard against such negligence. But the courts differ somewhat as to who is a fellow-servant within the meaning of this rule. There are practically two lines of decisions upon the question. On the one hand it is held, adopting the superior servant criterion, that when the master has given to an employe supervisory control and management of his business, or some particular department thereof, such person, while so acting, stands in the place of the master, as to those under his direction and supervision, and for his negligence the master is liable. This is known in the books as the "Ohio Doctrine," and was adopted in effect by the Supreme Court of the United States in Railway Co. v. Ross, 112 U. S. 377; but that case has been very much modified, if not in effect practically overruled, by the subsequent case of Railroad Co. v. Baugh, 149 U. S. 368. Under this rule the liability of the master is made to depend upon the rank or grade of the person whose negligence caused the injury. On the other hand, the rule, and the one now unquestionably established and supported by the great weight of authority both in this country and in England, is that the liability of the master depends upon the character of the act in the performance of which the injury arises, and not the grade or rank of the negligent employe. If the act is one pertaining to the duty the master owes to his servant, he is responsible for the manner of its performance, without regard to the rank of the servant or employe to whom it is intrusted; but, if it is one pertaining only to the duty of an operative, the employe performing it is a fellow-servant with his co-laborers, whatever his rank, for whose negligence the master is not liable. (Citing cases.) Many other authorities could be cited to the same effect, but these are sufficient to show the irresistible current of the decisions, as well as the ground upon which the doctrine rests, and its application to given facts.

And so is the logical result of the former decisions of this court, as the liability of the master for an injury to a servant, caused by the negligence of another employe, has always been

made to depend upon the character of the act causing the injury, rather than the grade or rank of the offending employe. (Citing Oregon cases.) It is the personal and absolute duty of the master to exercise reasonable care and caution to provide his servants with a reasonably safe place to work, reasonably safe tools, appliances, and instruments to work with, reasonably safe material to work upon, suitable and competent fellow-servants to work with them, and to make needful rules and regulations for the safe conduct of the work; and he cannot delegate this duty to a servant of any grade so as to exempt himself from liability to a servant who has been injured by its nonperformance. Whoever he intrusts with its performance, whatever his grade or rank, stands in the place of the master, and he is liable for the negligence of such employe to the same extent as if he had himself performed the act, or been guilty of the negligence. But when the master has performed his duty in this regard, and provided competent employes, a reasonably safe place to work, suitable materials, tools, and appliances to work with, and needful rules and regulations, and the like, he has discharged his whole duty in the premises, and is not liable to a servant for the negligence of another servant while engaged as an opertive. It is true that from this doctrine results the conclusion that an employe may in certain cases occupy a dual position to his fellow-workmen. He may be a vice principal or the representative of the master as to all matters where he is intrusted with the discharge of duties which the master himself is required to perform, and a co-servant in the discharge of duties not personal to the master. But this conclusion is a logical one, and has been recognized and applied under many varieties of facts. See McKinney, Fel. Serv., note to section 42.

The true test in all cases by which it may be determined whether the negligent act causing the injury is chargeable to the master, or is the act of a co-servant, is, was the offending employe in the performance of the master's duty, or charged therewith, in reference to the particular act causing the injury? If he was, his negligence is that of the master, and the liability follows; if not, he was a mere co-servant, engaged in a common employment with the injured servant, without reference to his grade or rank, or his right to employ or discharge men, or his control over them. In short, the master is liable for the negli-

gence of an employe who represents him in the discharge of his personal duties towards his servants. Beyond this he is liable only for his own personal negligence. * * * Now under this rule it is clear that defendant is not liable for the act of West in directing the plaintiff to load the hole, even if it was neglect; for he was not then engaged in the discharge of any duty which the master owed to the plaintiff, but was a fellow-servant, the risk of whose negligence was assumed by the plaintiff when he entered upon the employment. There is no pretense that West was not a fit and competent person to have charge of the work, or that the master was negligent in employing him, but the sole ground of liability alleged is the negligence of West in a matter not pertaining to any duty the defendant owed to the plaintiff. It follows from these views that the judgment of the court below must be affirmed, and it is so ordered.

CHAPTER II.

WORKMEN'S COMPENSATION ACTS.

IVES v. SOUTH BUFFALO RY. CO.

201 N. Y. 271. 1911.

Action by Ives against the Railway Co.; from a judgment of the Appellate Division affirming a final judgment for plaintiff entered on a decision sustaining a demurrer to defenses pleaded in the answer, defendant appeals: reversed. The action was brought by an employe against his employer to recover compensation under the New York Labor Law of 1910. The complaint alleges in substance that on April 2, 1910, while working as a switchman on defendant's railroad, he was injured solely by reason of a necessary risk or danger of his employment and to an extent recited, which averments the answer admitted. The unconstitutionality of the Labor Law was set up in defense, to which a demurrer was sustained. The Act mentioned consists of 12 sections and "the question presented on this appeal is whether it is repugnant to any of the provisions of the federal and state constitutions invoked by defendant." The following is a summary of its provisions:—Sec. 215 enumerates the workmen to whom the law applies and contains eight classes of employment (including the operation on steam railroads of locomotives, etc.) deemed dangerous; sec. 216 defines various words used; sec. 217 specifies the basis of liability, including "a necessary risk or danger of the employment"; sec. 218 excludes prior injuries from the effect of the Act; sec. 219 provides for notice of the accident; sec. 219-a fixes the amount of compensation both in cases of death and of total or partial incapacity, and recites:—"In no event shall any compensation paid under this Article exceed the damage suffered, nor shall any weekly payment payable under this Article in any event exceed $10 a week or extend over more than 8 years from the date of the accident"; sec. 219-b governs medical examinations; sec. 219-c provides for

proceedings in case the workman is incompetent; sec. 219-d refers to settlements of disputes; sec. 219-e gives the workman certain preferences and exemptions; sec. 219-f relates to attorneys' liens; sec. 219-g fixes the liability of both principal and subcontractors.

WERNER, J. (After stating the facts and giving a history of the Act involved.) The statute, judged by our common-law standards, is plainly revolutionary. Its central and controlling feature is that every employer who is engaged in any of the classified industries shall be liable for any injury to a workman arising out of and in the course of the employment by "a necessary risk or danger of the employment or one inherent in the nature thereof: * * * provided that the employer shall not be liable in respect of any injury to the workman which is caused in whole or in part by the serious and willful misconduct of the workman." This rule of liability, stated in another form, is that the employer is responsible to the employe for every accident in the course of the employment, whether the employer is at fault or not, and whether the employe is at fault or not, except when the fault of the employe is so grave as to constitute serious and willful misconduct on his part. The radical character of this legislation is at once revealed by contrasting it with the rule of the common law, under which the employer is liable for injuries to his employe only when the employer is guilty of some act or acts of negligence which caused the occurrence out of which the injuries arise, and then only when the employe is shown to be free from any negligence which contributes to the occurrence. The several judicial and statutory modifications of this broad rule of the common law we shall further on have occasion to mention. Just now our purpose is to present in sharp juxtaposition the fundamentals of these two opposing rules, namely, that under the common law an employer is liable to his injured employe only when the employer is at fault and the employe is free from fault; while under the new statute the employer is liable, although not at fault, even when the employe is at fault, unless this latter fault amounts to serious and willful misconduct. The reasons for this departure from our long-established law and usage are summarized in the language of the commission as follows:

"First, that the present system in New York rests on a basis

that is economically unwise and unfair, and that in operation it is wasteful, uncertain, and productive of antagonism between workmen and employers.

"Second, that it is satisfactory to none, and tolerable only to those employers and workmen who practically disregard their legal rights and obligations, and fairly share the burden of accidents in industries.

"Third, that the evils of the system are most marked in hazardous employments, where the trade risk is high and serious accidents frequent.

"Fourth, that, as matter of fact, workmen in the dangerous trades do not, and practically cannot, provide for themselves adequate accident insurance, and therefore the burden of serious accidents falls on the workmen least able to bear it, and brings many of them and their families to want."

This indictment of the old system is followed by a statement of the anticipated benefits under the new statute as follows: "These results can, we think, be best avoided by compelling the employer to share the accident burden in intrinsically dangerous trades, since by fixing the price of his product the shock of the accident may be borne by the community. In those employments which have not so great an element of danger, in which, speaking generally, there is no such imperative demand for the exercise of the police power of the state for the safeguarding of its workers from destitution and its consequences, we recommend, as the first step in this change of system, such amendment of the present law as will do away with some of its unfairness in theory and practice, and increase the workman's chance of recovery under the law. With such changes in the law we couple an elective plan of compensation which, if generally adopted, will do away with many of the evils of the present system. Its adoption will, we believe, be profitable to both employer and employe, and prove to be the simplest way for the state to change its system of liability without disturbance of industrial conditions. Not the least of the motives moving us is the hope that by these means a source of antagonism between employer and employed, pregnant with danger for the state, may be eliminated."

This quoted summary of the report of the commission to the legislature, which clearly and fairly epitomizes what is more fully

set forth in the body of the report, is based upon a most voluminous array of statistical tables, extracts from the works of philosophical writers and the industrial laws of many countries, all of which are designed to show that our own system of dealing with industrial accidents is economically, morally, and legally unsound. Under our form of government, however, courts must regard all economic, philosophical, and moral theories, attractive and desirable though they may be, as subordinate to the primary question whether they can be molded into statutes without infringing upon the letter or spirit of our written Constitutions. In that respect we are unlike any of the countries whose industrial laws are referred to as models for our guidance. Practically all of these countries are so-called constitutional monarchies in which, as in England, there is no written constitution, and the Parliament or law-making body is supreme. In our country the Federal and State Constitutions are the charters which demark the extent and the limitations of legislative power; and while it is true that the rigidity of a written constitution may at times prove to be a hindrance to the march of progress, yet more often its stability protects the people against the frequent and violent fluctuations of that which, for want of a better name, we call "public opinion."

With these considerations in mind we turn to the purely legal phases of the controversy for the purpose of disposing of some things which are incidental to the main question. The new statute, as we have observed, is totally at variance with the common-law theory of the employer's liability. Fault on his part is no longer an element of the employe's right of action. This change necessarily and logically carries with it the abrogation of the "fellow-servant" doctrine, the "contributory negligence" rule, and the law relating to the employe's assumption of risks. There can be no doubt that the first two of these are subjects clearly and fully within the scope of legislative power, and that, as to the third, this power is limited to some extent by constitutional provisions.

The "fellow-servant" rule is one of judicial origin, ingrafted upon the common law for the protection of the master against the consequences of negligence in which he has no part. In its early application to simple industrial conditions, it had the support of both reason and justice. By degrees it was extended

until it became evident that, under the enormous expansion and infinite complexity of our modern industrial conditions, the rule gave opportunity, in many instances, for harsh and technical defenses. In recent years it has been much restricted in its application to large corporate and industrial enterprises, and still more recently it has been modified, and to some extent abolished, by the labor law and the employer's liability act.

The law of contributory negligence has the support of reason in any system of jurisprudence in which the fault of one is the basis of liability for injury to another. Under such a system it is at least logical to hold that one who is himself to blame for his injuries should not be permitted to entail the consequences upon another who has not been negligent at all, or whose negligence would not have caused the injury if the one injured had been free from fault. It may be admitted that the reason of the rule is often lost sight of in the effort to apply it to a great variety of practical conditions, and that its efficacy as a rule of justice is much impaired by the lack of uniformity in its administration. In the admiralty branch of the federal courts, for instance, we have what is known as the rule of comparative negligence, under which, when there is negligence on both sides, it is apportioned, and a verdict rendered accordingly. In many of the states contributory negligence is a defense which must be pleaded and proved by the defendant, and in some states it has been entirely abrogated by statute. In our own state the plaintiff's freedom from contributory negligence is an essential part of his cause of action, which must be affirmatively established by him, except in cases brought by employes under the labor law, by virtue of which the contributory negligence of an employe is now made a defense which must be pleaded and proved by the employer, and under the employer's liability act, which provides that the employe's continuance in his employment after he has knowledge of dangerous conditions from which injury may ensue, shall not, as matter of law, constitute contributory negligence.

Under the common law the employe was also held to have assumed the ordinary and obvious risks incident to the employment, as well as the special risks arising out of dangerous conditions which were known and appreciated by him. This doctrine, too, has been modified by statute, so that under the labor law

and the employer's liability act the employe is presumed to have assented to the necessary risks of the occupation or employment and no others; and these necessary risks are defined as those only which are inherent in the nature of the business and exist after the employer has exercised due care in providing for the safety of his employes, and has complied with the laws affecting or regulating the business or occupation for the greater safety of employes.

We have said enough to show that the statutory modifications of the "fellow-servant" rule and the law of "contributory negligence" are clearly within the legislative power. These doctrines, for they are nothing more, may be regulated or even abolished. This is true to a limited extent as to the assumption of risk by the employe. In the labor law and the employer's liability act, which define the risks assumed by the employe, there are many provisions which cast upon the employer a great variety of duties and burdens unknown to the common law. These can doubtless be still further multiplied and extended to the point where they deprive the employer of rights guaranteed to him by our Constitutions, and there, of course, they must stop, as we shall endeavor to demonstrate later on.

Passing now to the constitutional objections which are presented against the new statute, we will first eliminate those which we regard as clearly or probably untenable. The appellant argues and the respondent admits that the new statute cannot be upheld under the reserved power of the Legislature to alter and amend charters. * * *

The appellant contends that the classification in this statute of a limited number of employments as dangerous is fanciful or arbitrary, and is, therefore, repugnant to that part of the 14th amendment to the Federal Constitution which guarantees to all our citizens the equal protection of the laws. Classification, for purposes of taxation, or of regulation under the police power, is a legislative function, with which the courts have no right to interfere, unless it is so clearly arbitrary or unreasonable as to invade some constitutional right. * * * There can be no doubt, we think, that all the occupations enumerated in the statute are more or less inherently dangerous to a degree which justifies such legislative regulation as is properly within the scope of the police power. * * * The mandate of the Federal

Constitution is complied with if all who are in a particular class are treated alike (citing cases) and that, we think, is the effect of this classification.

Another objection urged against that statute is that it violates sec. 2, art. 1 of our State Constitution, which provides that "the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." This objection is aimed at the provisions of secs. 219-a and 219-d of the statute, which relate to the "scale of compensation" and "settlement of disputes," and has no reference to the fundamental question whether the attempt to impose upon the employer a liability, when he is not at fault, constitutes a taking of property without due process of law. In other words, the objection which we are now considering bears solely upon the question whether the two last-named sections of the statute deprive the employer of the right to have a jury fix the amount which he shall pay when his liability to pay has been determined against him. If these provisions relating to compensation are to be construed as definitely fixing the amount which an employer must pay in every case where his liability is established by the statute, there can be no doubt that they constitute a legislative usurpation of one of the functions of a common-law jury. In all cases where there is a right to trial by jury there are two elements which necessarily enter into a verdict for the plaintiff: (1) the right to recover; (2) the amount of the recovery. It is as much the right of a defendant to have a jury assess the damages claimed against him as it is to have the question of his liability determined by the same body. East Kingston v. Towle, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. St. Rep. 174; Wadsworth v. Union Pacific Ry. Co., 18 Colo. 600, 33 Pac. 515, 23 L. R. A. 812, 36 Am. St. Rep. 309; Fairchild v. Rich, 68 Vt. 202, 34 Atl. 692. This part of the statute, in its present form, has given rise to conflicting views among the members of the court, and, since the disposition of the questions which it suggests is not necessary to the decision of the case, we do not decide it.

Thus far we have considered only such portions of the statute as we deem to be clearly within the legislative power, and one as to which there is difference of opinion. This we have done because we desire to present no purely technical or hypercritical obstacles to any plan for the beneficent reformation of a branch

of our jurisprudence in which, it may be conceded, reform is a consummation devoutly to be wished. In this spirit we have called attention to those features of the new statute which might be upheld as consonant with legislative authority under our constitutional limitations, as well as to the sections upon which we are in doubt. We turn now to the two objections which we regard as fatal to its validity.

This legislation is challenged as void under the fourteenth amendment to the Federal Constitution and under section 6, art. 1 of our State Constitution, which guarantee all persons against deprivation of life, liberty, or property without due process of law. * * * "Process of law" in its broad sense means law in its regular course of administration through courts of justice, and that is but another way of saying that every man's right to life, liberty, and property is to be disposed of in accordance with those ancient and fundamental principles which were in existence when our Constitutions were adopted. * * * Liberty has been authoritatively defined as "the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation" (Matter of Jacobs, 98 N. Y. 98, 106, 50 Am. Rep. 636); and the right of property as "the right to acquire, possess and enjoy it in any way consistent with the equal rights of others and the just exactions and demands of the state" (Bertholf v. O'Reilly, 74 N. Y. 509, 515, 30 Am. Rep. 323). The several industries and occupations enumerated in the statute before us are concededly lawful within any of the numerous definitions which might be referred to, and have always been so. They are, therefore, under the constitutional protection. One of the inalienable rights of every citizen is to hold and enjoy his property until it is taken from him by due process of law. When our Constitutions were adopted, it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another. That is still the law, except as to the employers enumerated in the new statute, and as to them it provides that they shall be liable to their employes for personal injury by accident to any workman arising out of and in the course of the employment which is caused in whole or in part, or is contributed to, by a necessary risk or danger of the employment

or one inherent in the nature thereof, except that there shall be no liability in any case where the injury is caused in whole or in part by the serious and willful misconduct of the injured workman.

It is conceded that this is a liability unknown to the common law, and we think it plainly constitutes a deprivation of liberty and property under the Federal and State Constitutions, unless its imposition can be justified under the police power, which will be discussed under a separate head. In arriving at this conclusion we do not overlook the cogent economic and sociological arguments which are urged in support of the statute. There can be no doubt as to the theory of this law. It is based upon the proposition that the inherent risks of an employment should in justice be placed upon the shoulders of the employer, who can protect himself against loss by insurance and by such an addition to the price of his wares as to cast the burden ultimately upon the consumer; that indemnity to an injured employe should be as much a charge upon the business as the cost of replacing or repairing disabled or defective machinery, appliances, or tools; that, under our present system, the loss falls immediately upon the employe who is almost invariably unable to bear it, and ultimately upon the community which is taxed for the support of the indigent; and that our present system is uncertain, unscientific, and wasteful, and fosters a spirit of antagonism between employer and employe which it is to the interests of the state to remove. We have already admitted the strength of this appeal to a recognized and widely prevalent sentiment; but we think it is an appeal which must be made to the people, and not to the courts. The right of property rests, not upon philosophical or scientific speculations, nor upon the commendable impulses of benevolence or charity, nor yet upon the dictates of natural justice. The right has its foundation in the fundamental law. That can be changed by the people, but not by the Legislature. * * *

Law, as used in this sense, means the basic law, and not the very act of legislation which deprives the citizen of his rights, privileges or property. Any other view would lead to the absurdity that the Constitutions protect only those rights which the Legislatures do not take away. If such economic and sociological arguments as are here advanced in support of this statute

can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe, because there is no limitation upon the absolute discretion of legislatures, and the guarantees of the Constitution are a mere waste of words. (Citing cases.) * * *

The argument that the risk to an employe should be borne by the employer, because it is inherent in the employment, may be economically sound; but it is at war with the legal principle that no employer can be compelled to assume a risk which is inseparable from the work of the employe, and which may exist in spite of a degree of care by the employer far greater than may be exacted by the most drastic law. If it is competent to impose upon an employer who has omitted no legal duty and has committed no wrong, a liability based solely upon a legislative fiat that his business is inherently dangerous, it is equally competent to visit upon him a special tax for the support of hospitals and other charitable institutions, upon the theory that they are devoted largely to the alleviation of ills primarily due to his business. In its final and simple analysis that is taking the property of A. and giving it to B., and that cannot be done under our Constitutions. Practical and simple illustrations of the extent to which this theory of liability might be carried could be multiplied ad infinitum, and many will readily occur to the thoughtful reader.

There is, of course, in this country no direct legal authority upon the subject of the liability sought to be imposed by this statute; for the theory is not merely new in our system of jurisprudence, but plainly antagonistic to its basic idea. The English authorities are of no assistance to us, because in the king's courts the decrees of the Parliament are the supreme law of the land; although they are interesting in their disclosures of the paternalism which logically results from a universal employer's liability based solely upon the relation of employer and employe, and not upon the fault of the employer. There are a few American cases, however, which clearly state the legal principle which, we think, is applicable to the case at bar, and with a brief reference to them we shall close this branch of the discussion. (Citing and briefly discussing same.) * * *

We conclude, therefore, that in its basic and vital features the right given to the employe by this statute does not preserve

to the employer the "due process" of law guaranteed by the Constitutions, for it authorizes the taking of the employer's property without his consent and without his fault. So far as the statute merely creates a new remedy, in addition to those which existed before, it is not invalid. The state has complete control over the remedies which it offers to suitors in its courts, even to the point of making them applicable to rights or equities already in existence. It may change the common law and the statutes, so as to create duties and liabilities which never existed before. * * *

The power of the state to make such changes in methods of procedure and in the substantive law is clearly recognized. * * * (Citing cases.) We repeat, however, that this power must be exercised within the constitutional limitations which prescribe the law of the land. "Due process of law" is process due according to the law of the land, and the phrase as used in the fourteenth amendment of the Federal Constitution with reference to the power of the states means the general law of the several states as fixed or guaranteed by their Constitutions. As stated by Mr. Webster, in the Dartmouth College Case, "the law of the land is the general law, the law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial."

If we are warranted in concluding that the new statute violates private right by taking the property of one and giving it to another without due process of law, that is really the end of this case. But the auspices under which this legislation was enacted, no less than its intrinsic importance, entitle its advocates to the fullest consideration of every argument in its support, and we therefore take up the discussion of the police power under which this law is sought to be justified. The police power is, of course, one of the necessary attributes of civilized government. In its most comprehensive sense it embraces the whole system by which the state seeks to preserve the public order, to prevent offenses against the law, to insure to citizens in their intercourse with each other the enjoyment of their own so far as is reasonably consistent with a like enjoyment of rights by others. Under it persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state. But it is a power which is always subject to

the Constitution, for in a constitutional government limitation is the abiding principle, exhibited in its highest form in the Constitution as the deliberative judgment of the people, which moderates every claim of right and controls every use of power. In the language of Chief Justice Shaw in Commonwealth v. Alger, 7 Cush. (Mass.) 85: "It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise." It covers a multitude of things that are designed to protect life, limb, health, comfort, peace, and property according to the maxim "Sic utere tuo ut alienum non lædas," but its exercise is justified only when it appears that the interests of the public generally, as distinguished from those of a particular class, require it, and when the means used are reasonably necessary for the accomplishment of the desired end, and are not unduly oppressive. Lawton v. Steele, 152 U. S. 133, 137; Colon v. Lisk, 153 N. Y. 188, 196, 47 N. E. 302, 60 Am. St. Rep. 609; Wright v. Hart, 182 N. Y. 330, 75 N. E. 404, 2 L. R. A. (N. S.) 338. In order to sustain legislation under the police power, the courts must be able to see that its operation tends in some degree to prevent some offense or evil, or to preserve public health, morals, safety, and welfare. If it discloses no such purpose, but is clearly calculated to invade the liberty and property of private citizens, it is plainly the duty of the courts to declare it invalid; for legislative assumption of the right to direct the channel into which the private energies of the citizen may flow, or legislative attempt to abridge or hamper the right of the citizen to pursue, unmolested and without unreasonable regulation, any lawful calling or avocation which he may choose, has always been condemned under our form of government. * * *

In this argument the learned counsel ignores, or at least misses, as we think, the vital distinction between legislation which imposes upon an employer a legal duty, for the failure to perform which he may be penalized or rendered liable in damages, and legislation which makes him liable notwithstanding he has faithfully observed every duty imposed upon him by law. * * *

With all due respect to the members of the commission, we beg to observe that the statute enacted in conformity with their recommendations does not stop at reversing the common law.

It attempts to reverse the very provisions of the Constitution which, the commissioners admit, are obviously beyond the reach of the Legislature.

We cannot understand by what power the Legislature can take away from the employer a constitutional guaranty of which the employe may not also be deprived. If it is beyond the power of the Legislature to take from the representatives of deceased employes their rights of action under the Constitution, by what measure of power or justice may the Legislature assume to take from the employer the right to have his liability determined in an action at law? Conceding, as we do, that it is within the range of proper legislative action to give a workman two remedies for a wrong, when he had but one before, we ask: By what stretch of the police power is the Legislature authorized to give a remedy for no wrong? If, before the passage of this law, the employer had a right to a jury trial upon the question of liability, where and how did he lose it? Can it be taken from him by the mere assertion that this statute only reverses the common-law doctrine that the employe assumes the risk of his employment? It would be quite as logical and effective to argue that this legislation only reverses the laws of nature, for in everything within the sphere of human activity the risks which are inherent and unavoidable must fall upon those who are exposed to them.

We must admit that what the Legislature may prohibit it may absolutely control. Where the right to exist, as in case of corporations, depends upon the will of the Legislature, that right may be granted subject to prescribed conditions. In such a case an employer may be made an insurer of the safety of his employes as a condition of the permission to engage in business. But when an industry or calling is per se lawful and open to all, and therefore beyond the prohibitive power of the Legislature, the right of governmental control is subject to such reasonable enactments as are directly designed to conserve health, safety, comfort, morals, peace, and order. Lochner v. New York, 198 U. S. 45. For the failure of an employer to observe such regulations, the Legislature may unquestionably enact direct penalties or create presumptions of fault which, if not rebutted by proof, may be regarded as sufficient evidence of liability for damages. That must be the extreme limit of the police

power, for just beyond is the Constitution, which, in substance and effect, forbids that a citizen shall be penalized or subjected to liability unless he has violated some law or has been guilty of some fault.

The limitations of the police power are illustrated in a great variety of cases. (Citing numerous cases.) * * *

In support of this new statute we are also asked to consider the supposed analogies of the law of deodands, the common-law liability of the husband for the torts of his wife, the liability of the master for the acts of his servant, and the liability of a ship for the care and maintenance of sick or disabled seamen.

From the historical point of view, these subjects might be very entertainingly elaborated, but for the practical purposes of this discussion they may be very briefly disposed of. If the law of deodands was ever imported into this country, it has never, to our knowledge, found expression in a single statute or judicial decision. * * * Quite as far-fetched seems the argument based upon the common-law liability of the husband for the torts of his wife. * * * The admiralty cases * * * seem to us equally inapplicable as authorities for the proposition that the law recognize liability without fault. * * * We think it may confidently be asserted that within the whole range of the maritime law there will be found no rule which renders master, owner, or ship liable in damages for an injury sustained by the seaman without fault on the part of any one, or without any fault except his own. * * *

Great reliance is placed upon the case of St. Louis & San Francisco Ry. Co. v. Mathews, 165 U. S. 1, in support of the contention that there may be liability where there is no delinquency. That was an action brought by an owner of land adjoining the defendant's railroad to recover damages for the destruction of his dwelling house and other buildings, caused by fire which spread from sparks emitted by the defendant's locomotives.

The action was brought under a statute of the state of Missouri. * * * The statute was upheld as being within the legislative power of the state. That decision is amply supported by a number of reasons which have no application to the controversy at bar. * * *

Quite aside from the considerations which support such a statutory liability against railroad corporations, it may be added that it is in no sense an extension of the rule of the common law to modern conditions, but in reality a return to the original common-law doctrine under which every person who permitted fire started by him to escape beyond his house or close was liable to every one who suffered loss or injury thereby. * * *

In the addenda to the instructive brief of the counsel for the commission, our attention is called to three decisions of the Federal Supreme Court which have been but recently decided. Noble State Bank v. Haskell, 219 U. S. 104; Assaria State Bank v. Dolley, 219 U. S. 121; and Engel v. O'Malley, 219 U. S. 128. These cases, it is contended, strongly support the validity of the legislation which we are condemning because, as counsel asserts, they go directly to the ultimate question: "Is the act an unreasonable regulation of the status of employment?" We have tried to make it clear that in our judgment this statute is not a law of regulation. It contains not a single provision which can be said to make for the safety, health or morals of the employes therein specified, nor to impose upon the enumerated employers any duty or obligation designed to have that effect. It does not affect the status of employment at all, but writes into the contract between the employer and employe, without the consent of the former, a liability on his part which never existed before and to which he is permitted to interpose practically no defense, for he can only escape liability when the employe is injured through his own willful misconduct. That is a defense which needs no legislative sanction, since it would be abhorrent to the most primitive notions of justice to permit one to impose liability for his willfully self-inflicted injuries upon another who is wholly free from responsibility for them. The case of Engel v. O'Malley, supra, is so clearly distinguishable from the case at bar that we need only state the facts to mark the contrast.

* * * * * * * * * * *

As to the cases of Noble State Bank v. Haskell, and Assaria State Bank v. Dolley, we have only to say that if they go so far as to hold that any law, whatever its effect, may be upheld because by the "prevailing morality" or the "strong and preponderant opinion" it is deemed "to be greatly and immedi-

ately necessary to the public welfare," we cannot recognize them as controlling of our construction of our own Constitution. * * * All that it is necessary to affirm in the case before us is that in our view of the Constitution of our state the liability sought to be imposed upon the employers enumerated in the statute before us is a taking of property without due process of law, and the statute is therefore void.

Judgment reversed, directed for the defendant, with costs in all courts.

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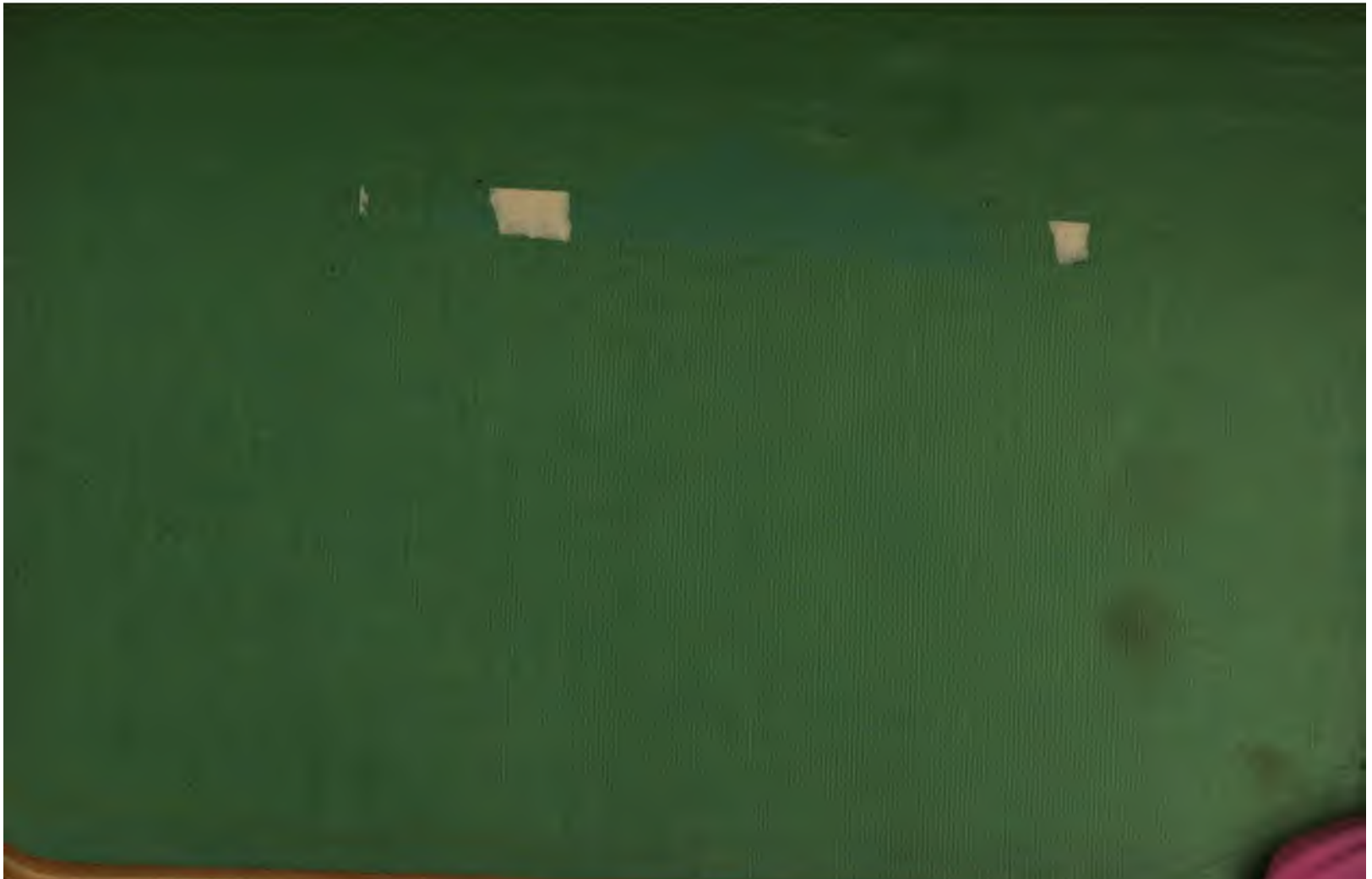

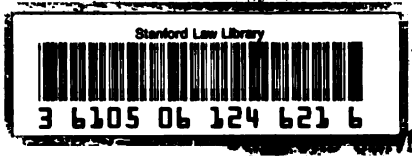

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